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Editor's Message

This first issue of 2012 looks forward to our Second International Conference in July 2013, with contributions from some of our expected speakers and on some of our forthcoming topics at that event, from Australia, South Africa, the United States, Japan, Spain and England and Wales.

Sir Peter Singer, one of the first of the newly qualified Family Arbitrators, and a distinguished former Judge of the Family Division of the High Court of Justice in London, leads off with an account of the new Dispute Resolution tool of Family Arbitration under the rules of the Institute of Family Law Arbitrators. He will be the Arbitrator in our mock Family Arbitration hearing on the third day of the 2013 conference.

From Spain, where the impact of the 1996 Hague Convention is already being felt by English expatriates litigating there in cases involving children, Spanish Abogada Reyes Gomez Lloriente, of the Anglo Spanish law firm De Cotta Law, explains the effect of the new requirement to apply the Convention's concept of the Applicable Law, ie the Law of Spain in place of the long constitutionally established national law of the parties in English cases. This will be followed up at the 2013 conference by academic speakers from the University of Barcelona with more news of creative Spanish jurisprudence in the post-Franco era.

From Australia, with nods to Sweden and Germany (where European provisions have influenced the distinguished former Australian Chief Justice of the Family Court in his search for optimum methods for facilitating the voice of the child) two articles collaborated on by a trio of writers, Professors Lisa Young and Eva Ryrstedt and the Hon Alastair Nicholson himself, set out to explain the Australian approach to children's participation in proceedings which affect their lives and to examine the way forward for Sweden in potentially reforming the approach of its judicial system in this respect. Professor Young will be speaking at the 2013 conference in a comparative context with Judge Nick Wikeley of the Upper Tribunal of Her Majesty's Courts and Tribunals Service in London on Child Maintenance.

From South Africa a member of the South African Bar and an Attorney from Pretoria look at children's rights in relation to representation in cases involving their families and the resulting impact on them, in relation to the Hague Convention and to the historic development of such representation. At the 2013 Conference both Professor Julia Sloth-Nielsen from the University of the Western Cape and Judge Belinda van Heerden of the Supreme Court of Appeal, Bloemfontein will be speaking, as will other South African lawyers.

From the United States and Japan a trans-world child case, *Toland v Futagi*, has generated a trio of articles in relation to a little girl living with her maternal grandmother in Japan whose American father has not seen her for many years: the perspectives of his American counsel from Maryland,

USA and the child's Japanese grandmother's counsel from Japan raise questions of importance to potential issues in future cases before either Japanese or American courts in relation to children of mixed Japanese and American parentage who may find themselves in similar proceedings in the other's jurisdiction, as highlighted by Professor Otani writing on the Japanese approach, and on which there is also comment from an English constitutional lawyer on the aspect of judicial comity. Kelly Powers of Miles & Stockbridge from Maryland will be speaking at the 2013 Conference on the cross border problems in which the firm specialises and Professor Otani, who is Vice-Chair of the Japanese Working Group on their ratification of the Hague Convention, is also speaking at the conference (on the Hague Convention).

Our next issue will continue to look forward to the Centre's Second International Conference in 2013.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

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Arbitration in Family Financial Proceedings: The IFLA Scheme[1]

Sir Peter Singer*

Most people experiencing relationship breakdown wish their financial dispute to be dealt with as swiftly, cheaply, privately, and with as little acrimony, as possible. For those who wish that dispute to be resolved by an independent third party who will reach a conclusive decision, rather than to engage in a more or less face-to-face but potentially inconclusive negotiation, opting for family arbitration can have a number of distinct advantages as an alternative to other forms of dispute resolution. Arbitration furthermore offers more privacy than conventional court proceedings and allows the parties the dignity of having as much 'ownership' of the progress of what is after all their process.

This article is intended as an introduction to this innovative Scheme which utilises arbitration procedures well-established in commercial and other *fora* to resolve financial disputes upon relationship breakdown. Its techniques are as well apt to decide one or more discrete issues as a dispute ranging over all available forms of relief. As a financial case proceeds to court irresolvable issues can emerge which block the lane to sensible settlement: arbitration of such single or preliminary issues may open the way through to an earlier settlement than could be achieved via the courts with their existing listing overload. Resort to arbitration may prove a satisfactory last port of call when a mediation or a collaborative endeavour looks likely to capsize and sink after it runs up against what threatens to be a deal-breaker.

In order better to describe the potential advantages of arbitration as an option to conventional court proceedings, or as an alternative or an adjunct to other established forms of family dispute resolution, here is an overview of the Scheme[2] which was developed after consultation with the Family Justice Council and other interested bodies.

Overview of the Scheme

In February 2012 the Scheme was launched by the Institute of Family Law Arbitrators (IFLA), in association with the Centre for Child and Family Law Reform at City University in the City of London. IFLA's stakeholders are Resolution, the Family Law Bar Association and the Chartered Institute of Arbitrators (CIArb). Frances Burton, a Research Fellow at London Metropolitan University, and a long standing member of the Centre for Child and Family Law Reform, is a Director of IFLA Ltd, the Institute's not-for-profit company.

To be accepted on the training course candidates must satisfy minimum requirements which effectively restrict admission to specialist family legal practitioners only. IFLA Scheme Arbitrators are trained under the aegis of the Chartered Institute of Arbitrators and (subject to passing a demanding award-writing examination) are then awarded Membership of CIArb (MCIArb). They are thus subject to the Code of Conduct and Disciplinary Regulation Procedures of CIArb[3] .

The Scheme operates in accordance with and under the provisions of Part 1 of the Arbitration Act 1996 [4], and in accordance with IFLA's Arbitration Rules[5] ('the Rules') and references to articles in this article are to the Articles of those Rules.

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[1] Material in this article in part derives from the website http://www.FamilyArbitrator.com which he co-edits with fellow arbitrators Gavin Smith and Rhys Taylor, and from a valuable contribution by Dr Wendy Kennett of Cardiff University Law School. The Paper has developed from a Chapter contributed by Sir Peter to Unlocking Matrimonial Assets on Divorce (Sugar, Bojarski et al, Jordans, Bristol, 3rd edn.).

[2] For a succinct 20-step summary as a personal vademecum, or as an informative hand-out for clients, visit http://www.familyarbitrator.com/family-arbitration/procedural-summary

[3] The Code as well as the list of currently accredited arbitrators are available on the IFLA website: http://www.IFLA.org.uk

[4] The link in the body of the text is to Part 1 of the 1996 Act (with thanks to my co-editors of @eGlance for the use of this hyperlinked version). To view and/or download a version incorporating commentary on the Act go to http://www.familyarbitrator.com/family-arbitration/arbitration-act-with-commentary

[5] Currently the 2012 (2nd edition) Rules. The link in the body of the text is to the Rules as promulgated. To view and/or download a version with explanatory annotations go to http://www.familyarbitrator.com/family-arbitration/the-rules

By Art 2.2, the Scheme may be adopted (and, as we shall see, adapted as required) for financial and property disputes arising from marriage and its breakdown (including financial provision on divorce, judicial separation or nullity); civil partnership and its breakdown; co-habitation and its termination; parenting or those sharing parental responsibility; and provision for dependants from the estate of the deceased. The Scheme includes, but is not limited to, claims pursuant to s. 17 of the Married Women's Property Act 1882, Part II of the Matrimonial Causes Act 1973, s. 2 of the Inheritance (Provision for Family and Dependants) Act 1975, Part III of the Matrimonial and Family Proceedings Act 1984 (financial relief after overseas divorce), Schedule 1 of the Children Act 1989, the Trusts of Land and Appointment of Trustees Act 1996, the Civil Partnership Act 2004 (Schedule 5, or Schedule 7, Part 1, para 2: financial relief after overseas dissolution); and other civil partnership equivalents where corresponding legislative provision has been made.

The scheme does not apply to questions concerning the liberty of individuals, the status either of individuals or of their relationship, the care or parenting of children, bankruptcy or insolvency, nor can it bind any person or organisation not a party to the arbitration (Art 2.3).

Section 33 of the 1996 Act describes it as the general duty of an arbitrator in conducting the arbitral proceedings, in taking decisions on matters of procedure and evidence, and in the exercise of all other powers conferred on him or her to:

> 'a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.'

Submitting a dispute to arbitration

By the arbitration application form, the IFLA Form ARB1 the parties may either seek the appointment of a nominated arbitrator or request IFLA to select an arbitrator from its Family Arbitration Panel (art 4.3). It is anticipated that those who choose to submit their dispute to arbitration, after discussion with and between their lawyers, will select the arbitrator of their choice rather than leave selection to the IFLA organisers.

By Form ARB1 the parties agree to be bound by the arbitrator's written decision (known as an 'award'), subject to (a) any right of appeal or other available challenge; (b) (insofar as the subject matter of the award requires it to be embodied in a court order) any changes which the court making that order may require; and (c) (in the case of an award of continuing payments) any future award or order varying the award (para 6.4 of ARB1 and Art 13.3).

Paragraph 6 of ARB1 repays close attention, and it is critical that the obligations upon the arbitrees that it contains are fully and clearly explained to them by their respective lawyers before they adopt the process. It is likely to be the practice of some arbitrators that the arbitrator will also offer such an explanation to the parties, together and in person, before the form ARB1 is signed so as to be satisfied that they fully appreciate and accept those obligations and their binding nature.

The parties also agree that they will not, while the arbitration is continuing, commence an application to the court (nor continue any subsisting application) relating to the same subject matter, except in connection with and in support of the arbitration or to seek relief that is not available in the arbitration (para 6.2 and AA 1996 sections 42 to 45). This resonates with the obligations upon the court to encourage and support alternative forms of dispute resolution to be found in Part 3 of FPR 2010 of which the most salient for present purposes are:

> 3.1.-(1) This Part contains **the court's powers to encourage the parties to use alternative dispute resolution and to facilitate its use**.
> (2) The powers in this Part are subject to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
> **Court's duty to consider alternative dispute resolution**
> **3.2. The court must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate.**
> **When the court will adjourn proceedings or a hearing in proceedings**
> **3.3.-(1) If the court considers that alternative dispute resolution is appropriate, the court may direct that the proceedings, or a hearing in the proceedings, be adjourned** for such specified period as it considers appropriate-
> (a) to enable the parties to obtain information and advice about alternative dispute resolution; and
> (b) where the parties agree, to enable alternative dispute resolution to take place.
> (2) The court may give directions under this rule

on an application or of its own initiative.

(3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.

[Emphasis added]

I hope that before long a practice will emerge whereby a consent application to adjourn pending financial proceedings to await the outcome of arbitration, accompanied by a copy of Form ARB1, should routinely and without attendance prompt the making of the necessary order, whether for stay or for adjournment.

Furthermore, if and so far as the subject matter of the award makes it necessary, the parties bind themselves to apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award (para 6.5 of Form ARB1 and Art 13.4). As to this, see the sections on Implementing the Award, and Enforcing an Award Against a Recalcitrant Party, below.

The juridical framework

Disputes under the scheme are arbitrated in accordance with the Arbitration Act 1996, Part 1; and beneath the Act, the Rules to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and below that the agreement of the parties, to the extent that that excludes, replaces or modifies the non-mandatory provisions of the Act or the Rules (Art 1.3). Think of it as a pyramidal hierarchy, with party autonomy as the bottom but indispensable tier.

The Act contains both 'mandatory' and 'non-mandatory' provisions, as to which see section 4(1) and Schedule 1. This arrangement is likely to be unfamiliar to many family lawyers but is perhaps self-explanatory, and empowers the parties in relation to their own arbitration to agree to modify or exclude the operation of non-mandatory provisions. The mandatory provisions are however the bedrock, the lowest common denominator of fundamental and immutable provisions, which the parties may not agree to exclude, replace or modify.

The Rules establish what is in effect a default setting pre-selecting the application (or not) of the non-mandatory provisions, so as to form a self-contained code for family arbitrations of financial disputes: but even these remain subject in some instances to variation by the parties. The bottom line which must not be crossed is adherence to the provisions of the Act and of its mandatory provisions.

The Rules contain just one but a very important additional mandatory requirement in Art 3, which provides that the substance of the dispute is to be arbitrated in accordance with the law of England and Wales (Art 1.3(c)). Thus are excluded so-called arbitral awards by individuals or organisations (for instance religious tribunals) who do not comprise IFLA Panel Arbitrators, who or which do not operate within the IFLA scheme, and whose applicable law may not be the law of England and Wales.

Thus, subject only to the mandatory provisions of the Arbitration Act 1996 and of Art 3 of the Rules, the parties retain substantial powers to regulate the process (although once the arbitration has commenced those powers may only be exercised with the agreement of the arbitrator (Art 1.4)). This approach to dispute resolution derives from the Arbitration Act 1996, section 1 of which provides that arbitration pursuant to an arbitration agreement is founded on three principles:

'(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and

(c) in matters governed by Part I of the Act, the court should not intervene except as provided by that Part…

and requires that 'the provisions of this Part … shall be construed accordingly.'

This emphasis on party autonomy in section 1(b) has important and it may be crucial resonances for arbitrations in the sphere of family financial disputes: a theme that I will develop later.

Section 1 of the Act is somewhat analogous therefore to the overriding objectives already familiar from the CPR 1998, and now also from Part 1 of FPR 2010.

Procedural flexibility

The arbitrator will generally give procedural directions at the outset of the arbitration[6] , and as necessary during its course. Conferences, video-link and skype calls can be arranged to suit participants' convenience if for any reason a face-to-face meeting is problematical.

Most arbitrators are likely to encourage e-mail

[6] A Checklist Schedule of suggested topics for consideration and exchange by the parties and their advisers in advance of this first 'directions' meeting is freely available from the FamilyArbitrator.com website.

communication on questions which arise during the course of the arbitration, but will be alert to ensure compliance with Art 6.1 which requires any communication between the arbitrator and the other party to be copied to that other party. Arbitrators will also be scrupulous (consistent with the obligation imposed by Art 6.3) that no aspect of a dispute or of the arbitration is discussed with one party or their legal representatives without the participation of the other party and theirs, unless the communication is solely for the purpose of making administrative arrangements.

The procedure adopted will depend on the nature of the issues in dispute which will range from a determination sought on paper alone through to a full hearing with oral evidence and oral or written submissions.

Art 10 ('general procedure') contains a CPR-style procedural régime, while art 12 ('alternative procedure') provides for a régime similar to the FPR Part 9 financial remedy procedure. Those provisions provide alternative default procedures which the parties can adopt, unless indeed they agree another approach.

Thus it can be seen that a significant difference between arbitration and conventional court proceedings is the freedom which the parties enjoy to agree on the procedure which they wish should apply to the resolution of their dispute. So the parties, prior to the commencement of the arbitration (constituted by the arbitrator's formal acceptance letter) or thereafter with their arbitrator's consent, may adapt and modify the process to meet their needs and their means and the particular characteristics of the issues they bring for adjudication. As a general observation one would not expect that an arbitrator's assent (where required) to procedural shifts upon which both parties agreed would be arbitrarily or unreasonably withheld.

Seeking the assistance of the court in aid of the arbitration

As with tango it takes two to arbitrate (indeed three, for no arbitrator is obliged to accept an appointment). But what must perforce commence consensually as to the mode of resolution of a dispute does not always prove to be plain sailing. One party may develop dissatisfaction with how things are panning out, not like the direction or the drift the ship seems to be taking, and hope that by bailing out he or she can bring the voyage to a premature end. But once the arbitration has commenced any party who decides to go back to their tent and sulk will soon be disabused of the notion that they can draw stumps with impunity. He (or she) who shouts 'I don't want to play with you any more' can be reminded that they are bound by the duties imposed on the parties by section 40 of the Arbitration Act, in these terms:

> '(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
> (2) This includes—
> (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, ...'

I do not propose to deal with this situation in detail and hope that in practice it will not arise often, but if (for instance) an arbitrator has given directions as to disclosure or discovery which a party disregards, then there are two options. The arbitrator may continue notwithstanding, and draw such inferences as may be justified from the refusal to produce documentation, after warning the defaulter via an 'unless' order that that is what he proposes to do. Or the other party may institute an application inviting the court to give similar directions, backed by the additional stimulus and incentive of a warning as to the potentially penal consequences of non-compliance.

A court can also make orders for the inspection or preservation of property, and make interim injunctions which are outside the scope of an arbitrator's authority. Resort may also need to be had to the court for an order requiring the attendance of a reluctant witness.

These examples (and they are only examples) demonstrate the extent to which the relationship between arbitration and the court process can be both cooperative and symbiotic.

The award, and costs

Unless the parties agree otherwise or the award is by consent (Art 13.2), the award must be delivered in writing and contain sufficient reasons to show how and why the arbitrator has reached the decisions contained in it.

While there are presumptions, unless the parties agree otherwise, that there will be no order for costs *inter partes* and that the parties will be liable for the arbitrator's fees in equal shares (Art 14.4), the arbitrator has discretion to make costs orders which take account of litigation/arbitration conduct (Art 14.5). If the parties in any given case wish to incorporate the *Calderbank*[7] procedure then they may do so.

[7] An offer expressed to be made without prejudice save as to costs: *Calderbank v Calderbank* [1976] Fam 93, (1975) FLR Rep 113. Such offers are inadmissible in proceedings for a financial remedy before the courts: FPR 2010 r. 28.3(8).

The potential benefits of arbitration

I shall return later, and in some detail, to the important questions of how to implement an award; and what are the prospects of frustrating implementation and upsetting it either by an appeal brought under the grounds afforded by the 1996 Act, or by opposition from a recalcitrant party who repents of his (or her) bargain. But meanwhile may I set out some of arbitration's potential benefits on my stall: to my mind in those cases where arbitration may be appropriate they are piled pretty high.

I make no apology for repeating the paragraph with which I began:

> *Most people experiencing relationship breakdown wish their financial dispute to be dealt with as swiftly, cheaply, privately, and with as little acrimony as possible. For those who wish their dispute to be resolved by an independent third party rather than by one of the available forms of more or less face-to-face negotiation, yet seek to have as much 'ownership' of the process as possible, opting for family arbitration can have a number of distinct advantages as an alternative to court proceedings or other forms of dispute resolution:*

- **Choice of arbitrator:** A key feature of arbitration is that the parties themselves, guided by their lawyers (if they have them), select the person whom they wish to arbitrate their dispute. By contrast, in the court process judges are allocated to cases and the parties do not have the right to request (or, perish the thought, avoid) a particular judge.

- **Arbitrator's availability:** Also, in the court system (as many of you will know only too well) any number of different judges may well be involved at different stages of a case, whilst in arbitration the appointed arbitrator alone will deal with the dispute from start to finish. A variety of immeasurable advantages can flow from consistency of tribunal. Pressures within the court system can result in judges not having sufficient time to prepare for hearings in advance, and parties must come to court not knowing whether their case will start or finish on time or will be reached at all. In arbitration, however, the arbitrator is engaged by the parties with the specific task of resolving their dispute. The arbitrator's continuous involvement means that he or she will set aside time to read the papers and to prepare thoroughly for hearings, and will be available to deal promptly with applications for directions and other issues that may arise in the course of the process. Hearings can be listed at short notice to suit all participants' diaries, at a time of day to suit business or family commitments, and at their preferred venue (which may be abroad if circumstances require it).

- **Selection of issues to be arbitrated:** Arbitration is a very versatile and adaptable process. The parties may decide to appoint an arbitrator to arbitrate one or more specific issues, such as (for example) the valuation of a specific asset, or the nature of a disputed gift or loan, or the true beneficial ownership of property, or (in a case involving trusts or private companies) whether property or funds within the trust or company are a resource 'available' to a spouse[8] . The issues may be determined all at once, or sequentially at specified intervals of time to permit negotiation and settlement of the other issues in the interim. At the other end of the spectrum, the arbitrator may be appointed to deal with all the issues involved in a full financial remedy claim resulting from divorce or civil partnership dissolution.

- **Unlock your mediations:** and indeed collaborative law negotiations, if either of those processes is teetering on the edge of irrevocable discord because the parties cannot agree between themselves on one or more discretely identifiable issues. Conventionally in such an impasse the representatives' advice may be to commission a jointly-instructed opinion from an external, neutral lawyer or other specialist. If the problem is, however, legal (rather than for an accountant, an actuary or a valuer) a surer solution may be to see whether the parties can agree on the identity of an arbitrator under the IFLA scheme. A difficulty with an opinion, from however luminary a source and with whatever degree of clarity and force it is expressed, is that one party or the other (or both) may not accept it: leaving them stuck where they started. But if they are prepared to agree to be bound by the outcome arbitration may be the solution, and once they with good or bad grace have received a

[8] Bearing in mind, however, that third parties will only be formally bound by the award made in the arbitration if they have also agreed to become parties to the arbitration: and there can be no obligation on them to cooperate in this way.

binding award the way to overall settlement may then open[9] . That way also they avoid the risk that either the mediation will founder, or that they will forfeit the involvement of their collaborative lawyers.

- **Speed of the process:** From start to finish the arbitration process is likely to take very significantly less time than contested court proceedings, and the timetable can more easily be tailored to suit the parties' convenience. Thus the extra expense of the arbitrator's fee should be set against the spectre of the additional costs (not to mention the prolonged anxiety and uncertainty) imposed by the long wait for a final court hearing. No need to fret at the likelihood, indeed often the inevitability, that by the time the delayed hearing date finally looms there will be the considerable further expense of fresh valuations of property or of companies, and all the burden and cost of the correspondence which will inexorably meanwhile mount.

- **Keeping the lawyers**: If the parties have instructed lawyers, they are able to, and normally will, retain them throughout the arbitration process for advice, preparatory work and representation at hearings. Arbitration does not, like mediation can, involve seeing your client go off into closed conclave from which only muffled smoke signals intermittently emerge! While there is nothing to stop parties representing themselves in an arbitration, it is strongly recommended that they should at least have taken independent legal advice before committing themselves to the process.

- **Control of the procedure:** The parties 'own' the procedure to a far greater extent than in court proceedings. For instance, they can agree that the arbitrator should make his or her award based on consideration of the paperwork alone (which may be suitable where the issues are narrow) or that there should be a court-style hearing. If they opt for a hearing, they can decide in advance whether the arbitrator is to hear oral evidence or just submissions. This ability to streamline the procedure may well lead to significant savings of time and costs.

- **Complete confidentiality**: The arbitration process is completely private. Hearings take place at a venue of the parties' choice, and there is no possibility of media access at any stage. Papers are held securely in the arbitrator's office.

- **A Specialist Tribunal:** Although the parties may instruct the most expert legal teams in their dispute there is no guarantee that the judge appointed by the court listing officer will have the same degree of specialist knowledge or experience in resolving financial disputes or of the often highly complex financial arrangements the parties are seeking to unravel. Indeed there are situations, let us be frank, where the local judge likely to be deciding a financial dispute has less experience of such cases than a local (or not so local) solicitor or barrister advocate-cum-arbitrator specialist. The IFLA Panel contains (and as it expands will continue to include) a range of specialist family finance practitioners drawn from both branches of the profession (plus a retired judge or more) with extensive experience of the whole gamut of financial disputes.

- **An Arbitrator for All Reasons:** The parties with the guidance of their advisers can tailor-cut their coat according to the expense and quality of the cloth available within their range (in terms of the complexity of the dispute and the arbitration fee level they can afford). At the risk of a surfeit of mixed metaphors, there are horses for every type of course amongst the runners in the Arbitration Stakes…

Grounds for appeal under the Arbitration Act 1996

The available grounds under the Arbitration Act 1996[10] upon which the High Court can interfere with an arbitral award (whether by setting it aside, varying it, confirming it in part only and/or by remitting it for further consideration) are closely circumscribed. Furthermore, in some cases the court's permission is required before the process can be embarked upon.

An award may be challenged on the ground that it or the arbitral tribunal (that is, in this context, the arbitrator) lacked substantive jurisdiction[11] . In such a situation the

[9] The parties and their advisers in a collaborative context, or in cooperation with their mediator (and with the advice of any lawyers retained), would normally need to be able to agree the factual issues underlying the reference (as indeed they would if settling instructions to counsel for an opinion on a disputed point). But for my part I could envisage a reference to arbitration in such a situation even when the arbitrator was charged with hearing evidence and making fact-findings upon which to base the award.

[10] Set out in sections 67 to 71 inclusive.

[11] Section 67.

court's permission is not required. No appeal however lies under this section unless any alternatively available remedies have been exhausted, or when more than 28 days have elapsed after the date of the award (or notification of the result of any such process)[12] . On appeal the court may confirm or vary the award, or set it aside in whole or in part.

Next, an award may be challenged for 'serious irregularity affecting the tribunal, the proceedings or the award'[13] . The court must be satisfied that the irregularity has caused or will cause substantial injustice to the applicant, and that it falls within one of a number of specific categories listed in section 68(2). An appeal may be barred if alternative remedies have not been exhausted or more than 28 days have elapsed. Furthermore the right to object can be forfeit if section 73 applies, which (broadly) disentitles a would-be appellant who does not take such an objection promptly but instead continues with the arbitral process. Late objections are thereby prevented. The primary remedy on a successful appeal under section 68 is for the award to be remitted, in whole or in part, for reconsideration by the tribunal; but if the court is satisfied that would be inappropriate it may set aside the award in whole or in part, or declare it or part of it to be of no effect.

Last, there is a right of appeal to the court on a question of law, unless (as they are entitled to do) the parties have agreed to exclude it[14] . An agreement (which the parties are entitled to reach if they so wish, perhaps to keep the costs of the arbitration to a minimum) to dispense with the ordinary requirement for an award to give reasons similarly excludes the court's appellate jurisdiction under this section. For such an appeal to proceed either all parties to the arbitration must agree or the court's leave must be given.

Leave for an appeal on a question of law will only be granted if the point satisfies the stringent requirements of section 69(3), quoted here as an illustration of the restrictive approach the statute envisages for the intervention of the court even where what may be a telling point of law is raised. The requirements are cumulative: the court must be satisfied of and on them all.

The court's leave to appeal on a question of law is only to be given if it is satisfied:

> '(a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award —
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
>
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.'

The same restrictions as above apply to an appeal on a point of law: no appeal lies unless any alternatively available remedies have been exhausted, or more than 28 days have elapsed after the date of the award (or notification of the result of any such process)[15] .

The experience in commercial arbitrations under the Arbitration Act1996 has been that very few appeals have been successful on a question of law[16] .

There are reasonable grounds to expect that family judges will apply as rigorous an approach to the requirement for permission and to substantive appeals as do their Queens Bench and Commercial Court colleagues in response to challenges against civil dispute arbitrations.

Implementing the Award

How the award is implemented will depend on the nature of the dispute.

Where the court does not have any supervisory role over the issues determined by the award (as for instance where it decides property claims between unmarried couples), the award may be enforced, with leave of the court, as though a court judgment or order[17] .

In financial remedy cases it is expected that parties will in general apply to the court for an order confirming the terms of the award, as their express agreement in Form ARB1 requires them to do. Indeed some potential

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[12] Section 70(2), (3)

[13] Section 68

[14] Section 69

[15] Section 70(2), (3)

[16] As to which see the 2006 paper Judicial Supervision and Support for Arbitration and ADR presented by Karen Gough of 39 Essex Street, a former President of CIArb, to be found at http://www.39essex.com/docs/articles/KGO_Judicial_Supervision_Sept_2006.pdf

[17] Arbitration Act 1996 s. 66(1)

ingredients of an award can have no concluded effect without an order: a clean break and a pension sharing order are examples.

It is beyond dispute that the jurisdiction of the court may not be ousted, because section 25 of the Matrimonial Causes Act 1973 imposes on the court a duty to decide whether and how to exercise its powers under sections 23 to 24E inclusive. This indeed has been the reason why some have in the past suggested (and some may still think) that the resolution of financial issues arising under the 1973 Act (and allied statutes with their own equivalent of section 25, such as Schedule 1 to the Children Act, or section 3 of the Inheritance (Provision for Family and Dependants) Act 1975) lay outside the terrain over which a 1996 Act arbitration could operate. But, in relation to arbitrations conducted under the IFLA Scheme by lawyer arbitrators accredited by CIArb, it is anticipated that it will only be in rare circumstances that the court will decline to uphold the award, given the parties' agreement at the outset to be bound by it.

I will comment in greater detail below on the developing approach to upholding settlement agreements apparent in the line of more recent cases flowing from *Edgar v Edgar*[18] and *Xydhias v Xydhias*[19]. These demonstrate greater willingness on the part of the courts to uphold the financial agreements parties make themselves as to how their affairs should be regulated after the end of their marriage.

It is anticipated that procedural arrangements will be established for the 'fast tracking' of consent orders based on arbitral awards under the IFLA scheme, as has been done in the case of agreements reached through the collaborative process[20] .

Enforcing an award against a recalcitrant party

There exists an inevitable and understandable uncertainty in what are still the early days of the arbitration scheme as to how courts will react to requests (especially if contested by one dissatisfied and would-be resilient party) for orders to be made which reflect an award.

I would expect that the person seeking to enforce the award will issue an application for the 'bad loser' to show cause why an order should not be made in the relevant terms and form. It is to be anticipated that such an application, if accompanied by a copy of the ARB1, the arbitral award, and the desired draft order would lead the court summarily to reject the wrecking attempt and make the order. But of course until the practice is well-established there is a risk that a judge will decide to second-guess the arbitrator[21] .

There may be some judges who will find it difficult, employing what might in the ordinary case be regarded as over-intrusive technicality or zeal, to hold back from exercising their paternal (or even avuncular) jurisdiction to re-investigate the section 25 factors, notwithstanding both parties' consent to an order in the terms of the reasoned award. The response to (and, if it comes to it in a suitable case, the appeal from) such an attitude should be firmly founded on the public policy considerations which favour party autonomy.

The appropriate judicial response when presented with a consent order for approval has never perhaps been subjected to more rigorous appraisal than by Munby J (as he then was) in the case of *L v L*[22] . The case is memorable moreover as the course over which the judge hunted down and duly unearthed that elusive (but not yet utterly extinct) beast, the forensic ferret, and repays reading if for that reason alone. He concluded with the observation that 'if epigrammatic phrases are preferred, the judge is not a rubberstamp. He is entitled but is not obliged to play detective. He is a watchdog, but he is not a bloodhound or a ferret.'

The passages in question fall between paragraphs [68] to [73] and are more relevant for present purposes for their consideration of the degree of assiduity a judge should exercise before approving a compromise or settlement. They deal with the court's function when invited to approve an ancillary relief consent order. Munby J ouvertures with some observations of Balcombe J (as he then was) in *Tommey v Tommey*[23] :

> 'A judge who is asked to make a consent order cannot be compelled to do so – he is no mere rubber stamp. If he thinks there are matters about which he needs to be more fully informed before he makes the order, he is entitled to make such enquiries and require

[18] (1981) FLR 19, CA
[19] [1999] 1 FLR 683, CA
[20] *S v P* (settlement by collaborative process) [2008] 2 FLR 2040
[21] à la *Piglowska v Piglowski[* 1999] 2 FLR 763, HL
[22] [2006] EWHC 956 (Fam), [2008] 1 FLR 26
[23] [1983] Fam 15 at 21

such evidence to be put before him as he considers necessary. But, per contra, he is under no obligation to make enquiries or require evidence. **He is entitled to assume that parties of full age and capacity know what is in their own best interests, more especially when they are represented before him by counsel or solicitors. …**'

[My emphasis, here and below]

His continuo is to underscore observations of Waite LJ in *Pounds v Pounds*[24] that the effect of the statute and the rules:

'is thus **to confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties' financial circumstances as disclosed to it in summary form, without descent into the valley of detail.** It is only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further investigation is required of the judge before approving the bargain that the spouses have made for themselves.'

Then by way of concluding crescendo he approves observations of Ward LJ in *Harris v Manahan*[25] that:

'The realities of life in the Principal Registry and the divorce county courts are that the district judges are under inevitable pressure and the system only works because the judges rely on the practitioners' help. I would, therefore, be very slow to condemn any judge for a failure to see that bad legal advice is being tendered to a party. **The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are sui juris and who are represented by solicitors know what they want.** Officious inquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid.'

These dicta are to be read in their context: ancillary relief proceedings had ended in a consent order made by a District Judge sitting in the Principal Registry. The husband later repented of his generosity to his wife and sought to escape from the order to which he had consented. He failed. The scope for backsliding, resiling and indeed any space for repentance should, in my view, be just as narrowly confined where what is in question is an attempt to wriggle out of the binding effect of an arbitral award.

In this context may I also repeat the words of section 1(c) of the Arbitration Act, that '*… in matters governed by Part I of the Act, the court should not intervene except as provided by that Part…*'

Party Autonomy

So 'Party Autonomy' should be the rallying-cry for, as already emphasised, it forms a key feature of arbitration. Section 1(b) of the Arbitration Act 1996 states that '*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*'. And it entirely consistent with this principle that by art 1.3 of the IFLA Rules the parties enjoy their very considerable freedom to exclude, replace or modify the non-mandatory provisions of the Act and of the Rules.

Significantly, the importance of autonomy is reflected in and has been emphasised by recent case law. It is clear that *Radmacher v Granatino*[26] , has changed fundamentally the way that the courts regard agreements between spouses, whether pre-nuptial or post-nuptial (or between civil partners), which govern the consequences of their relationship breakdown:

[75] The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

…

[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronizing to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely contingencies of an uncertain future.'

The scope and rationale of *Radmacher* have been

[24] [1994] 1 FLR 775 at 779

[25] [1997] 1 FLR 205 at 213

[26] [2010] 2 FLR 1900, SC

examined in a number of subsequent first instance decisions. Of note for present purposes is the passage in the judgment of Charles J in *V v V* [27]:

> 'To my mind, this decision [*Radmacher*] of the Supreme Court necessitates a significant change to the approach to be adopted, on a proper application of the discretion conferred by the MCA, to the impact of agreements made between the parties in respect of their finances. At the heart of that significant change, is the need to recognise the weight that should now be given to autonomy, and thus to the choices made by the parties to a marriage (see paragraph 78). The new respect to be given to individual autonomy means that the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made.'

It would be illogical if 'respect for autonomy' proves to be a divisible concept, applying only to substantive resolution by way of pre- or post-nuptial agreement but not also to the parties' choice for procedural resolution. In the former situations the fiancés or spouses bind themselves to a future outcome, maybe years later in unforeseeably changed circumstances: whereas those who submit their financial dispute to arbitration do so in the here and now. Their agreement is far more proximate to the outcome and thus, I suggest, even more binding - if anything can be even more binding then a pre-nup held to be binding!

Respect for party autonomy should not therefore just be a starting-point, nor a mere rallying-cry: it provides a principal and principled reason why the courts should regularly and routinely reflect arbitral awards in orders, where necessary and appropriate. The autonomous decision of the parties to submit to arbitration should be seen as a 'magnetic factor' akin to the pre-nuptial agreement in *Crossley v Crossley*[28] where the recalcitrant wife seeking detailed disclosure was denied it and held to the terms of the pre-nup via a summary disposal. In the course of judgment Thorpe LJ opined[29] :

> 'It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important'.

Thus an arbitral award founded on the parties' clear agreement in ARB1 to be bound by the award should be treated as a lodestone (more then than just a yardstick!) pointing the path to court approval…

Peter Singer

[27] [2011] EWHC 3230 (Fam) at [36]
[28] [2008] 1 FLR 467 CA at [15]
[29] Ibid. at [17]

The 1996 Hague Convention

1. Note on the 1996 Hague Convention:

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children

Frances Burton*

Although this 1996 Hague Convention was concluded 16 years ago, it was only ratified by the United Kingdom in 2012 and scheduled to come into force there in November 2012. It has over 30 contracting states and the subject matter is extensive, as mainly set out in its long title.

A matter of significant importance to expatriate British citizens of England and Wales resident in its European contracting states is the change it effects in the former approach to Applicable Law in cases involving children: whereas such persons have been used to the application of English Law as their personal law when litigating in Family Law matters in such states, they will in future often, and perhaps usually, find that this is no longer the case but that the country in which they live applies its own law. This may have significant impact where there are large concentrations of expatriate British families, eg in Spain and France.

The main points to note are as follows:

Applicable Law: the general rule is that each contracting state will apply its own law, if it has jurisdiction: Articles 15-22.

Jurisdiction: there are rules for which contracting states will have jurisdiction in child cases: Articles 5-14. The state of habitual residence of the child will usually have jurisdiction (although there are exceptions).

Recognition and Enforcement: the decision of a court in one contracting state is to be recognized in all other contracting states without the necessity of any other proceedings, although in some circumstances recognition can be refused: see Article 23. The procedure for enforcement of orders is determined by the law of the state in which enforcement is sought, in accordance with its own national law. This is no surprise since English expatriates have been used to procedure following the local *lex fori* when English law has formerly been applied as their own national law. The expectation of the Convention is that such procedural law under the new system will be "simple and rapid": Articles 23-28.

Co-operation: the Convention aims to improve child protection by providing for co-operation between relevant authorities in each contracting state: Articles 29-39.

Applicability: the Convention does not apply to every case involving a child and some areas are excluded: see Article 4. It will also have a relationship with the revised Brussels II Regulation, and is supported by The Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010, SI 2010/1898.

International Child Abduction: in relation to International Child Abduction the Convention will apply in conjunction with the 1980 Convention on International Child Abduction.

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2. The Hague Convention of 19 October 1996: Its Application in Spain and Some Practical Questions

Reyes Gomez Lloriente*

The Hague Convention of 19 October 1996 relates to jurisdiction, applicable law, recognition and enforcement of orders and co-operation between convention countries in matters of parental responsibility and measures for the protection of children, and entered into effect in Spain on 1 January 2011.

The entry into effect of the Hague Convention has displaced Articles 9.4 and 9.6 (and to an extent Article 107 where it refers to the effects of nullity of marriage, separation and divorce) of the Civil Code, affecting judicial proceedings in adopting measures for the protection of children and their assets. It has also brought about important changes in other spheres such as Notarial rules on acts where minors (i.e."children") or their representatives deal with a minor's assets such as sale of property belonging to the minor.

The Competent Court

The Convention establishes which court has "competence" (i.e."jurisdiction") to adopt measures for the protection of minors and their assets. The principal established is that the authorities of the contracting state where the minor has his/her habitual residence have competence (i.e. jurisdiction) to act. There are some exceptions in the Regulation if the authorities of another contracting state are better placed to make decisions about the child in question.

This can occur when divorce or separation proceedings are commenced in a country that is not the habitual residence of a child involved. The court dealing with the matrimonial proceedings will generally also deal with those matters relating to children such as custody, regime of visits, maintenance etc. There is an increasing number of cases where the matrimonial breakdown results in a change of residence of one of the parties, who may return to his/her country of origin and commence the divorce proceedings there while the child remains in the country of habitual residence with the other parent.

In accordance with Spanish procedural law (*Ley de Enjuiciamiento Civil*) when a nullity, separation or divorce is commenced the measures that affect the children of the marriage fall within the same proceedings. In Spain there are no independent proceedings that can be taken to regulate parent child relationships or financial matters for children of married parents unless the parents apply for divorce, separation or nullity. Therefore in such cases the competence of the court to hear applications on child matters within the principal matrimonial proceedings cannot be questioned.

Applicable Law

Another dynamic and important change as a result of the new Convention has been the change in the applicable law in proceedings that affect minors. Article 15 establishes that the applicable law will be that of the state where the minor is habitually resident. The competent court with jurisdiction will therefore apply its own law.

Previously the determinative factor was the application of the provisions of the Civil Code, which referred to the personal law of the child and parents. For example an English couple divorcing in Spain were required to provide proof of English law on divorce and on

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parental relations, custody, maintenance etc. The Spanish judge would require proof of the foreign law in a Certificate of Law provided by a professional or expert of the country in question.

With the entry into effect of the Convention, in the same circumstances as set out above the divorcing parents would need to provide proof of foreign law relating to the divorce or separation and its legal effects, but the legal measures requested for *children* would be heard under Spanish law.

Spanish law would decide parental responsibility, custody, visits etc. A further complication is that measures regarding maintenance for children are excluded by Article 4 of the Convention so the foreign law would be applied to the financial application for child maintenance.

For this reason the entry into force in Spain of the Convention means that in one sole set of proceedings different laws will be applied when adopting measures for *children*, including financial measures.

The situation will be same for measures relating to children when the parents are unmarried. Prior to the Convention the applicable law relating to children would be the personal law of the minor. With the changes to the Civil Code in Spain and the entry into force of the Convention the applicable law in such cases will be the law of the state where the minor has his or her habitual residence. This is apart from matters relating to maintenance where the *personal law of the child* i.e. the foreign law, will be applicable. As more than one law can be applied in these matters it is quite possible that in future difficulties of interpretation may arise, as it could be argued that Article 12.3 of the Civil Code could be decisive. This states that in applying foreign law the Spanish Courts will not apply the foreign law if it is contrary to public order.

As an illustration of the interpretation of the courts on public order matters, a Torrox Court (Málaga Province) refused the application of Scottish law in a child matter as the denial of rights of parental responsibility of unmarried fathers under that law was held to be contrary to the Spanish constitution. In the instant case the application of Scottish law at the time of the birth of the children denied parental responsibility to an unmarried father. The Spanish constitution does not allow discrimination between children of married and unmarried parents.

With the entry into effect of the Convention the Judge could apply Spanish law directly without reference to the foreign law.

Application of the Convention

A decision recently dictated by the Family court in San Sebastián has raised the question of the application of foreign law in matters of maintenance for children. In these proceedings the unmarried mother, T, presented an application to the court for maintenance after the entry into force of the Convention. The petition asked for the application of English law, the personal law of the minor, in accordance with the terms of the Civil Code.

The father, B, answered the petition, invoking Spanish law as applicable to the matter with reference to the Convention. The mother argued that, in spite of the application of the Convention to parental relations, the matter of maintenance should be decided in accordance with the personal or national law of the minor.

The court applied Spanish law to the matter deliberating on the seniority or hierarchy between the application of international Conventions and the norms established in the Constitution. Preference was given to the internal rules of the Constitution and treaties or conventions were considered to lack supra-national force. In my opinion this decision goes against the spirit of the Convention and the court should have differentiated between the two issues and applied different laws to the parental issues and the maintenance issues. Of course the application of two different laws in the same case does appear to be impractical, but given the express wording of the Convention the European legislation clearly left the question of maintenance outside the remit of the Convention of 1996.

Territorial Unity

The application of the law of habitual residence of the child can also give rise to the application of different regional laws within Spanish territory. Article 47 of the Convention remits the law to the place of habitual residence. Within Spain there are 17 autonomous regions of which Catalonia, Navarre, the Basque Country and Aragón have their own legal Codes and civil laws.

These communities have their own Civil laws which exclude the provisions of the national Civil Code within their own region.

This can affect child cases as a case with similar circumstances could be decided differently depending on which of the regional laws applies. For example some communities do accept the principal of shared custody even if the parents do not agree and others would reject shared custody that is not consensual.

The Civil Code has traditionally granted custody to one or other of the parents. Although shared custody is not expressly excluded from provisions on children there has equally not been any reference to this possibility in the norms or decisions on child custody. It was not until the revision of the Civil Code in 2005 that the concept of shared custody began to be properly considered. The possibility of shared custody was then brought in but with a series of conditions. The most important condition was the agreement of the parents. More recently the Supreme Court has moderated the requirement of consent of both the parents and now allows the court more discretion in deciding on shared custody orders without the consent of both parents.

Although the courts are now more flexible on the application of joint custody within those areas governed by the Civil Code there is still a tendency to grant custody to one parent where there is no agreement between the couple.

Nevertheless in some communities, most notably Catalonia and Aragón, new rules have been introduced regulating family breakdowns and stating that the preferred system is shared custody save where there are particular circumstances that dictate against it.

It is clear that with the evolution of society the legislators and the Courts are beginning to consider joint custody more widely and with the passage of time it is likely that this will become more commonly used. At the moment it is only applicable in certain regions and as yet most regions' decisions are in favour of one parent having custody.

At present where an English child has its habitual residence in Spain and the parents cannot agree on custody the outcome of a case on can differ greatly depending on which region they live in. In some regions joint custody will be the norm whereas in others this may be rejected if the parents do not actively consent.

> *Antes de publicarse el convenio, esta situación de diversidad legislativa dentro del territorio nacional no afectaba a los menores extranjeros cuya custodia debía decidirse conforme a su ley nacional (salvo que siendo parte de un procedimiento de divorcio se aplicara la ley española a éste), pero al entrar en vigor el convenio, los menores han quedado expuestos a tal diversidad normativa en este caso concreto, diversidad que en ningún caso debe interpretarse como inseguridad jurídica*.

Before the convention came into force this regional divergence did not affect foreign children whose habitual residence was in Spain. This was because the application of their personal law would have applied regardless of which region they lived in. If the parents did not share the same personal law matters for the children may in any event have been referred to Spanish law but previously if the parents were both English then English law would be applied to the children and parental relations. Though there is in practice no legal uncertainty it is the case that decisions on children can now vary depending on where they live in Spain.

The Voice of the Child in Australia, Sweden and Germany

1. The Child and the Judge: Reflections on the Voice of the Child in Australian Family Court Parenting Disputes

Lisa Young*
with Eva Ryrstedt **
and incorporating the personal reflections of the Hon Alastair Nicholson***

Many jurisdictions adopt, as their touchstone in resolving parenting disputes, the 'best interests of the child' principle. The difficulties in applying this concept are well known. In many instances its application is shaped by mandatory considerations, one common consideration being the child's wishes and views. Incorporating the views of children in the family law process is not contentious; however there has been much discussion as to how to obtain, and interpret, those views and wishes. In particular, there are diverse opinions on whether children should talk directly to judges[1]. This is the case, even though there is mounting evidence that children's interests are advanced by more direct participation[2].

In Australia judges can, and sometimes do, meet with children outside of the courtroom. However, children can only give evidence or even be present in court with the consent of the judge, which is rarely given. The reticence of the Australian judiciary to embrace direct participation of children has recently been highlighted by the work of Fernando, whose survey of judges confirmed what was generally understood; namely, that very few Australian judges interview children and many are strongly opposed to the practice[3]. In place of direct communication between children and judges, the common way of bringing the voice of the child into court is the use of reports by social scientists (what is known in Australia as a Family Report)[4]. However, there continues to be concern expressed as to whether this is the optimal way of including children's voices[5].

Not all Australian family court judges are, however, opposed to the practice. In adding to the growing literature on the benefits of direct communication with children, and in assessing any adverse consequences of the practice, it is instructive to reflect on the experiences of judicial activists in this area. In Australia, the most vocal member of the judiciary in favour of this practice has been The Honourable Alastair Nicholson AO, RFD, QC, former Chief Justice of the Family Court of Australia. Nicholson was one of few judges to support and adopt this practice.

In this article we will focus on the experiences of one of Australia's leading family law judges to shed further light on the difficult, and unresolved, question of children's participation in parenting disputes. We apply a common

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[1] We are not discussing here the possibility of children being heard formally in court, but rather being interviewed by the judge as part of the decision making process.

[2] For a full discussion of this issue, see M Fernando, 'Conversations between judges and children: An argument in favour of judicial conferences in contested children's matters' (2009) 23 AJFL 48; Commission for Children and Young People and Child Guardian, *The Representation of Children and Young People's Views in Australian Family Law Decision Making: A Discussion Paper*, available at http://www.ccypcg.qld.gov.au (accessed 28 August 2012), pp 2-3.

[3] M Fernando, 'What do Australian family law judges think about meeting with children' (2012) 26 *AJFL* 51.

[4] Children's wishes and views may also be provided through an 'independent children's lawyer' if one is appointed, see M Fernando, note 2 above, pp 50-51.

[5] M Fernando, note 2 above.

method in the social sciences called Key Informant Technique[6]. It is a qualitative ethnographic research method with the advantage of generating high quality data in a limited period of time from an expert source of information. Several criteria have been suggested for such a source such as: role in community, knowledge, willingness, communicability and impartiality[7]. The core of the article therefore reflects an interview with our selected key informant, Justice Nicholson[8], who can be construed as an ideal such informant for this topic. The article does not purport to provide any empirical or measurable data on the topic. Rather, it focuses on His Honour's personal reflections on this issue, drawn from a lifetime career in Australia's family law courts. Moreover, given that participation of children is relevant to all parenting cases, the discussion sets the issue within the broader context of the difficulty of making parenting decisions under the best interests model.

Nicholson has stood out amongst his peers as a judge open to the idea of interviewing children, and even more rarely, prepared to do it. The current Chief Justice, Diana Bryant, does not share Nicholson's enthusiasm for the practice, although she is currently considering studies to examine whether there are better ways of conveying to children that the views that they expressed were in fact taken into account. Given the degree of judicial discomfort with this practice evidenced in Fernando's survey, it is timely to reflect on the experiences of a strong advocate for children's rights. His insights provide further support for those who advocate that children deserve to have their voices heard more directly in family court. Before turning to Justice Nicholson's views, we have set out the legal context for children's participation in the Australian family courts.

The Australian legal context

Despite considerable amendment in 2006 to Part VII of the Family Law Act (1975) (FLA)[9], the basic principle remains that the paramount consideration in making any parenting order in Australia is the best interests of the child. The views and wishes of the child have long been a mandatory statutory consideration for decision makers. There is considerable discretion afforded as to the weight to be attached to a child's wishes; the words of the statute permit the court to take account of 'any' factors relevant to weight, 'such as the child's maturity or level of understanding'[10]. However, since 2006 this consideration (like most others) has moved from being one in a general list, to one in a list of 'additional' matters[11]. 'Primary considerations' are now promoting meaningful parental/child relationships and protecting children from abuse[12]. There have been judicial statements to the effect that, in certain cases, additional considerations may outweigh primary considerations[13]; nonetheless, as a matter of pure statutory interpretation, the fact that children's wishes are an additional, and not primary, consideration arguably must have some impact on the exercise of discretion.

Australian case law has long established that a child's wishes cannot be discounted simply on the basis of age alone[14], and that, where a child's wishes are not followed, explicit judicial reasoning must be provided[15]. There has not been any research on the extent to which children's wishes have impacted on outcomes; debate in Australia has focussed rather on the relative merits of introducing the wishes of children through third parties as opposed to judges talking directly with children.

There are three main ways the wishes of children can be introduced in Australian family courts[16]. All matters going to trial will have a Family Consultant appointed, and that court based social scientist will very often be charged with incorporating into their report to the court any wishes of the child and their recommendations as to those wishes. In some, but not all, cases, an Independent Children's

[6] M N Marshall, 'The key informant technique' (1996) 13(1) *Family Practice* 92.

[7] ibid with further references to M Tremblay, in *Field-Research: a Sourcebook and Field Manual*, Allen and Unwin, London, 1989.

[8] Conducted by Prof Eva Ryrstedt. The interview was conducted in December 2009 for the ultimate purpose of considering how Swedish law reform in this area might be influenced by the Australian experience; see the discussion of the Swedish position in Ryrstedt, Young and Nicholson, The voice of the child in Swedish family law, (2012) 3 FLP 1.

[9] This is the part of the Act which deals with parenting disputes.

[10] FLA, s 60CC(3)(a).

[11] Compare FLA s 60CC(2) and s 60CC(3)..

[12] FLA, ss 60CC(2)(a) and (b).

[13] *M and S* (2007) 37 Fam LR 32; FLC 93-313 per Desau J at [33].

[14] *Marriage of Joannou* (1985) FLC 91-531.

[15] *Harrison and Woollard* (1995) 18 Fam LR 788 at 825 per Baker J.

[16] FLA, s 60CD(2) expressly states that the court may inform itself of a child's views by such means as the court considers appropriate.

Lawyer[17] will be appointed, and they must advise the court of any wishes of the child, and can make recommendations in that regard. Finally, the FLA contemplates the possibility of children talking directly with judges, a practice known as 'judicial conferencing'. As Fernando has confirmed with her recent empirical work, this is very uncommon, and the specific provision dealing with it has in fact recently been removed from the Family Court Rules. Nonetheless, it is open to decision makers, subject to meeting the requirements of procedural fairness, to speak directly with children.

In terms of the Australian experience, Fernando points to the following arguments in favour of judicial conferencing as a complement to Family Reports:

- Clarification of evidence
- Introduction of current and important information that might not otherwise come before the court
- Ensuring decisions are made on the best available evidence
- Improved probative value of children's evidence by avoidance of a 'filtering' process
- Direct contact with a child may enhance judicial focus on the particular child's needs and best interests and the judge can discuss with them possible parenting options
- Reducing delay in urgent matters
- Meeting the (documented) desires of children to meet with decision makers, which has been shown to benefit children
- Recognition of children's rights as set out in international law

On the other hand, there is concern, including amongst family court judges themselves, that judges lack the expertise to take and interpret the evidence of children[18] and have insufficient understanding of child development[19]. Further, judges are hesitant about children being further enmeshed in parental conflicts and being subjected to increased parental manipulation[20]. There are also the obvious concerns about ensuring procedural fairness when information that may be heavily relied upon by a judge is not taken in the more typical, formal way[21].

While Fernando's survey of Australian judges found a degree of openness to the practice of judicial conferencing, this was more theoretical than real (given its rarity) and 30% of respondents were implacably opposed to the practice[22]. It is only with a change in judicial attitude that there is likely to be a change in practice in Australia. Indeed, if one looks across to Australia's near neighbour, New Zealand, a very similar legislative regime has seen much greater use[23] of direct participation of children, arguably because of greater judicial support for this concept[24]. Given the crucial role that the attitude of judges plays in Australia in this regard, in the remainder of this paper we will focus on Justice Nicholson's experiences and views.

A judge's experience

Alastair Nicholson was Chief Justice of the Family Court of Australia for 16 years, retiring in 2004. His Honour is recognised as a leading international campaigner for children's rights and was founding patron of Children's Rights International; he is now Chair of the Board of that organisation. Both during his time as Chief Justice and since his retirement, Nicholson has spoken out publicly in support of concrete action being taken both in Australia and overseas to advance children's rights. Unlike many others on the bench, Nicholson was known to support judicial conferencing, both in theory and in

[17] Under FLA s 68L a lawyer for the child can be appointed by the court; this lawyer does not act for the child, bur rather advocates for the child's best interests; see N Ross, 'Legal Representation of Children' in G Monahan and L Young (eds), *Children and the Law in Australia*, LexisNexis, Sydney, 2008, pp 551-3.

[18] R Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 AJFL 197 at 203; J Cashmore, 'Children's Participation in Family Law Matters' in C Hallet and A Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century*, Routledge Falmer, London, 2003, at 167; M Fernando, 'What do Australian family law judges think about meeting with children' (2012) 26 *AJFL* 51, p 65.

[19] J Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes" Current Research and Practice' (2002) 10 *Virginia Journal of Social Policy and the Law*, at 154; M Fernando, 'What do Australian family law judges think about meeting with children' (2012) 26 *AJFL* 51, p 66.

[20] M Fernando, note 3 above, p 66.

[21] ibid, pp 68-71.

[22] ibid, pp 67.

[23] In a study conducted of cases heard between 2001 and 2005, 41.5% of cases included a judicial interview with a child: P Tapp, 'Judges are Human Too: Conversation Between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of Children Act 2004' (2006) *NZLR* 35.

[24] M Fernando, note 3 above, pp 53-54. See also the discussion in M Fernando, note 2 above.

practice. In this sense, therefore, he is something of a rarity, and can provide insights into the practical benefits of the process and reflect on the perceived dangers. The following discussion reflects the comments of Nicholson in an interview that raised broad questions about judicial conferencing within the Australian legislative context for resolving parenting disputes more generally.

The inherent difficulties in applying the best interests principle

Incorporating the views of children is part of the general process of determining the best interests of a child. Nicholson stressed the difficulties in applying this notoriously nebulous concept; in practice, he says, one is often faced with determining what is the 'least worst' alternative for the child[25]. While Australian family law legislation provides a checklist of circumstances to be taken into account, such a list can only ever assist to a degree, given the very different circumstances of each case. At best it can give some rough guidance as to the types of things that the parliament thought a decision maker[26] ought to take into account in parenting disputes.

However, as Nicholson points out, to a decision maker it may sometimes seem easier to determine whether something is *not* in the child's best interest, rather than whether something *is*. There are some things that a decision maker may feel instinctively or otherwise know are *not* good for the child. A current parenting regime may not, on any test, appear to a decision maker to be the best arrangement for a child; however, in working out what *is* best, an Australian family court decision maker must usually[27] give significant consideration to shared parenting, which was superimposed onto the question of what arrangement is in a child's best interests by the 2006 reforms. In reconciling the statutory considerations, a true inquiry into the child's best interests may be lost, suggests Nicholson.

The inherent difficulty in applying the best interests of the child test stems both from its cultural relativity and from the possibility of natural 'bias' on the part of any decision maker. All decision makers, and particularly those exercising a discretion, as is usually the situation in family law cases, are inevitably affected by their own background and experience. Nicholson notes there is a clear risk that a decision maker will be influenced by their personal notion of what is good for children, whether or not they understand this forms a part of their decision making process. Nicholson considers that there is a real need for judicial education in this area to enable judges to recognise and have regard to this problem. Considerable work on this issue was done by the Western Judicial Education Centre in Canada and in the late 1990s a number of Australian judges, including Nicholson, participated in courses conducted by that Centre, both in Canada and Australia, which addressed this problem.

An obvious situation where such a bias might arise is in a case where the contest for parenting rights is between an indigenous and non-indigenous parent. Decision makers will invariably be white and middle aged; the potential for that decision maker to exhibit a preference for a non-indigenous caregiver is evident. Indeed, this is precisely why Nicholson was instrumental in persuading a previous Attorney-General that the best interests checklist should include very specific direction about the consideration of issues particular to indigenous culture[28]. There are however many other cases where this situation applies.

Nicholson's comments on the inherent difficulties of applying the best interests test highlight the need for decision makers to have the best, most current, information on which to base their decisions; judicial interviews with children are recognised as providing a potential benefit in this regard[29]. On the one hand, Nicholson reminds us of the need for exercising caution in relying on the unfettered exercise of judicial discretion to ensure that the best possible decisions are made. The statutory guidelines are complex and bias (in a general sense) is a natural part of all decision making. Indeed, a preconceived notion by a judge as to what might be best

[25] The notion of choosing the least worst outcome was raised in the seminal work of J Goldstein, A Freud and A Solnit, *Beyond the Best Interests of the Child,* 1973, Free Press, New York.

[26] Parenting decisions in Australia may be made by a range of judicial officers.

[27] Shared parenting must be actively considered by every decision maker where they have decided to order that the parents have 'equal shared parental responsibility' (ESPR): FLA, s 65DAA. ESPR is the equivalent to what was once called 'guardianship' in Australian law; it is the responsibility for major long-term issues affecting the child eg education, name, major medical decisions etc. Prior to 2006 guardianship was routinely joint, and since 2006 there has been a rebuttable presumption in favour of ordering ESPR: s 61DA. Thus, in many cases, ESPR will be ordered, and so shared parenting must be considered.

[28] FLA, ss 60CC(3)(h) and 60CC(6).

[29] Fernando highlights this as one of the advantages of judicial conferencing: M Fernando, note 2 above, p 53.

for a child, might best be reality checked by talking directly to a child about what they see as the best outcome. Nicholson's comments also highlight that the legislative provisions should be focussed on the *process* of gathering relevant evidence, rather than on prescribing consideration of particular parenting regimes *regardless* of the circumstances. This latter point is particularly forceful given the growing body of evidence challenging the benefit to children of the inclusion of legislative provisions that require mandatory consideration of particular models of shared parenting[30].

The judge's ultimate dilemma

Nicholson identifies two circumstances that stand out as presenting particular difficulties when making a parenting decision. These sets of circumstances appear as diametric opposites. The first is where both parents present as decent people and where each of them on their own would make an excellent parent for the child. The one flaw the parents exhibit is their inability to agree on a reasonable parenting arrangement. Such a scenario, says Nicholson, has the danger of leading to what might be described as the easy way out – 'sharing' the child. Such an outcome is intuitively attractive and difficult to avoid under the current Australian legislative regime, which prioritises shared parenting; moreover, not reaching such a conclusion could lead to the child being unnecessarily deprived of the real value that might be derived from the child spending more time with one or other parent.

Nicholson is alluding to the fact, however, that sharing the child may not truly be a decision as to the best interests of the child, which may be better advanced by some other parenting arrangement were it possible for these parents to facilitate such an arrangement. For example, Nicholson points out that there are cases where such 'good' parents have diametrically opposed parenting styles to the point where a shared parenting arrangement leads to confusion and uncertainty on the part of the child when he or she is transported from one household to the other. It is often said that hard cases make bad law; in family law, finely balanced cases have the potential to lead to less good decisions for children than in cases where the outcome is more obvious. At least in this scenario, however, the dangers to the child of a less than perfect outcome are less concerning than one might imagine in Nicholson's alternate scenario.

At the other extreme, and a case where an imperfect outcome due to the difficulty of the case presents much greater risks to children, is the situation where there has been an allegation of sexual abuse against one of the parents. As Nicholson stresses, these are the kinds of hard cases where often a 'least worst' outcome has to be chosen by the decision maker. Very often a decision maker will be left with a situation where abuse is not proved, but there is a disconcerting *possibility* that abuse has occurred. As many commentators have noted, the dangers of excluding a child from contact with a parent in circumstances where no abuse has occurred have to be weighed against the risk of permitting contact where abuse has occurred[31]. A corollary of this problem is the risk that the allegation of abuse has been falsely made by the other parent[32]. If this is the case (and this can be very difficult to establish) it will tell strongly against such a parent having care and control of the child. The stark reality is that, either way, the wrong decision could have disastrous implications for the child.

Nicholson's scenarios highlight the limitations of a process that seeks to predict - at one point in time - best outcomes for children based on often imperfect past evidence. That is a very tall order, at least if one expects best possible outcomes for children. And it will invariably be the hardest of all cases that end up being resolved in court; when the evidence falls such that a Solomon's choice has to be made, one wonders whether an outsider might look at the process and consider it to be something of a lottery.

Given this, it might also seem strange to an outsider that the person *most directly affected* by such 'line-ball' decisions is not directly heard in court. Both cases present scenarios where it might be argued that the proper and timely inclusion of direct input from children might increase the chance of the decision maker coming down on the best side for the child.

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[30] B Fehlberg, B Smyth, M Maclean and C Roberts, Legislating for shared time parenting after separation: A research review, (2011) 25 *International Journal of Law, Policy and the Family*, 318 pp 320-321.

[31] For a discussion of the issues, see R Chisholm, Child abuse allegations in family law cases: A review of the law, (2011) 25 AJFL 1; J Fogarty AM, 'Unacceptable risk – A return to basics' (2006) 20 *AJFL* 249.

[32] As to the likelihood of false allegations, and the actual difficulty of disproving them, see L Young, Child sexual abuse allegations in the Family Court of Western Australia: An Old Light on an old problem, (1998) 3 *Sister in Law* 98.

The adversarial system – part of the problem?

Justice Nicholson noted that, in his experience, one worrying aspect of the adversarial approach to child proceedings was that it often led to undue focus on trivial or irrelevant disputes about past events; the best interests of the children could be subsumed as the parents engaged in a cathartic exercise in which each sought to show the other one up. The nature of the adversarial system was such that it was very difficult for the judge to interfere. In addition, an overly adversarial approach had the disadvantages of increasing costs for parties and exacerbating the levels of aggression between them. Evidential objections would be raised based on very technical grounds. All of this had the potential to distract the court from the real issue, which was what was best for the children in the future.

The 2006 reforms to the FLA included amendments designed to reduce the adversarial nature of parenting disputes (known as the 'less adversarial trial' (LAT)). The LAT was introduced after a project run by Justice Nicholson and was inspired by a model from Germany. The German model[33], which departs considerably from models in jurisdictions with an historical preference for adversarial style litigation, provides the opportunity – from the very outset of the matter - for the judge to have contact with the child. Moreover, special consideration is given to this occurring in a physical space (including outside the court) that is less confronting for the child in question.

The Australian program lacks these particular child oriented features and this is arguably one of its weaknesses. However, the more child oriented approach that it does involve has allowed for the parties to be brought together with their lawyers, and a judge/magistrate, right at the start of the process, and only after dispute resolution has been unsuccessful. The ultimate decision maker is then able to define the issues with more direct involvement of the parties – this helps to avoid a purely legal defensive response. By allowing much greater judicial control over proceedings, from the very start the decision maker can identify the relevant evidence required and the relaxation of the rules of evidence afforded under a LAT provides greater judicial flexibility.

Justice Nicholson's early experience with the LAT process was that there was a startling increase in the appreciation of the parties of the true nature of child proceedings and a feeling that the essential issues were really being faced. At the same time, however, Nicholson notes that from the outset, some of the more 'traditional' judges – and also some lawyers – struggled with the breadth of the changes and were keen to find ways to move back into their comfort zone – namely a more adversarial hearing.

The LAT provides a very real opportunity for more direct participation of children in parenting disputes. Decision makers are involved at the outset, have more control over the process and evidence and can assess when and what input might assist from a child. While there has been no research to date specifically focusing on the impact of the LAT as distinct from the trial models of a LAT that preceded it, there are still significant obstacles as Fernando's research suggests, to its extension in a manner that more directly follows the German model.

One major defect of the LAT as incorporated into the FLA was that its use is optional at the direction of the trial judge or magistrate. Nicholson reports that judges have told him that the LAT places a much higher degree of responsibility upon the trial judge and requires a much higher degree of involvement by the judge in the process of the trial than is the case in an adversarial trial. While many judges relish this opportunity, there has been a natural tendency for some judges who are set in their ways or who are less energetic to revert to the adversarial system, often encouraged by lawyers appearing before them who lose most of their control over the litigation under the LAT.

Some judges and former judges have resented the suggestion that they see as implicit in the LAT, that family court trials have been unsatisfactory in the past, and which minimises their contribution to the development of family law. This is an unfortunate response as what lies behind the LAT is not a criticism of those who made the best of the previous system but rather an attempt to improve that system by changes in the law that take the best from other systems and incorporate them into Australian family law[34].

The judge talking to a child: one judge's experience

As indicated above, talking directly to a child in chambers in family law cases is permissible in Australia,

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[33] See Ryrstedt, Young and Nicholson, The voice of the child in Swedish family law, (2012) 3 FLP 1, referring to M Harrison, *Finding a better way: A bold departure from the traditional common law approach to the conduct of legal proceedings*, Family Court of Australia, 2007 available at www.familycourt.gov.au (accessed 8 January 2013).

[34] This is not to suggest that the introduction of the LAT has not been embraced by many judicial decision makers and has not brought significant improvements in areas other than direct participation of children: see M Harrison, ibid.

however remains uncommon. Justice Nicholson confirms that it has been a deliberate practice in Australia over the years not to involve children directly in the proceedings, relying rather on reports from counsellors; judges have an historical track record of being very wary about talking to children. However Nicholson considers that judicial interviews with children should be an essential concomitant of the LAT.

Two main concerns, as indicated above, about judicial conferencing are procedural fairness and lack of judicial skill in interviewing children. In relation to procedural fairness, Justice Nicholson confirmed that prior to the 2006 reforms, judicial wariness about interviewing children was motivated, at least in part, by concerns that decisions should not be made on material that was not put to the parties. Justice Nicholson pointed out, however, that there were always ways of dealing with this issue. It was open to the judge to see and talk to a child, then to go back into court, report what the child had told the judge and provide the parties with an opportunity to respond. Another approach, which he has used, has been to ask the children if they would be prepared to talk to a family counsellor (it would now be a Family Consultant) and convey to them what they have told the judge. If the children agree, a further report from the Family Consultant would be ordered which would permit the information to be introduced to the court in a legally admissible form.

Nicholson acknowledges the difficulties with interviewing children and in particular the need to disclose what they have said to the parents. He noted this was not always what children wanted and this could leave a judge in a problematic situation where he/she could not be specific about the information that led to their ultimate decision. Justice Nicholson also highlighted the importance, in deciding whether to interview a child, of assessing whether the parents would be able to accept what has been divulged so as to avoid negative consequences for the children.

Nicholson accepts that the reaction of parents to what children reveal to a judge will of course depend much on their character. However, he reported that some parents were quite pleased that the children had had the opportunity to participate in the process. Indeed, in his experience, there seemed rarely to be any real hostility by parents to a judicial conference with the child. Indeed, his Honour went on to say that parents may, in fact, be suspicious of what the Family Report says; however, if it is confirmed by what the child says to the judge, this can improve the situation somewhat for the parents. This in turn may make it easier for parents to reach an agreement.

Of course, on some occasions what a child reports to a judge can be very confronting and disappointing for some parents. Nicholson points out that judges are cognisant of the possibility of children being punished or reprimanded for the views expressed by them, however, this can arise whether they have spoken to a judge or a Family Consultant. As the court has no contact with the family after the decision is made there is little opportunity to know if this has occurred and this is obviously something that is very difficult for judges to reconcile.

In this respect, Justice Nicholson points out that a decision can be based on what the children say to a judge they want, without disclosure of precisely what has been said. However, as Justice Nicholson points out, if the child has expressed his or her wishes clearly, whether to a Family Consultant, a judge or an ICL, the judge must still explain their reasoning in their decision and why the wishes of the child are not being followed, where this is the case. In Nicholson's view, the older the child the more extended the explanation should be. Thus, there will always have to be disclosure to some degree.

As has been noted, research is supporting the conclusion that there are benefits for children in being permitted an interview. Nicholson's experience confirms this; he found children appreciated being able to talk to the actual decision maker. They appreciated being consulted in something that fundamentally affected them, even if their view did not prevail. The fact that the judge was prepared to have a conversation with them and to explore their views and took those into account made for a very positive experience for them.

In relation to the issue of lack of judicial skill, Nicholson accepts that the way an interview is carried out is crucial. Children need to feel at ease and so, while they can be seen in rooms inside the court, it may be appropriate to see them in another more neutral environment. However he notes that the lack of judicial conferencing *contributes* to a judge's lack of experience. Judges may then be left to rely on their own personal experiences of parenting. It will, of course, often be difficult to determine what a child actually wants. In addition to listening to what children tell a judge directly, they will need to take account of evidence as to what children have told neutral witnesses or Family Consultants. The interpretation of a child's wishes can be extremely difficult; while age is a factor, children may also want to protect parents, keep them both happy or even present a view to support a particular parent.

Justice Nicholson also emphasised the importance of reports from Family Consultants; in that sense, judicial conferencing is complementary to Family Reports[35]. In addition to disclosing information that might not be brought forward by, or even be known by, the parties' lawyers, reports are very likely to address matters that will be of great importance to the judge's final decision. Indeed, Justice Nicholson emphasised that, even when a child is interviewed by a judge, the Family Consultant's report will often be used to the same extent as where there is no interview, as very often there is conformity between what is in the report and what the child discloses to the judge. However, the additional information obtained from an interview with a child provides an opportunity to test the report; if the report differs from what the children report as their wishes in a judicial conference, the judge can use this to qualify the report. This additional information will provide a better backdrop against which to assess the weight that should be attached to the recommendations in the report. In Nicholson's experience, on occasions there can be quite significant differences between what the report says about the children and what the judge discovers from a face to face interview with the child. In addition, Nicholson notes that some children feel pressured, when interviewed by a Family Consultant, to provide a particular view and this is a further reason to read the report with caution when it conflicts with what the judge has been told by the child. The judge is then left with the task of forming an assessment as to what the child actually wants, however, with better evidence than would be provided by the report alone.

Nicholson says that the most difficult situation he has encountered when interviewing a child is where the child is mute and clearly does not wish to engage. Such situations can arise and raise the question of how the matter proceeded to the point of an interview without this being known. Under the FLA children are not required to express their views and it should only ever occur after a child has been asked if they wish to participate in this way. However in every instance where this occurred, the child or children were asked if they wished to see the judge and had agreed to do so. Normally they were seen in the presence of the family counsellor and the ICL. Where a child is then reticent, it may be that they have felt overcome by the circumstances or have been discouraged by a parent or parents from saying anything.

Nicholson considers that if there was a regular practice of judges seeing children, particular attention should be paid to where such interviews take place and who should be present. In this regard, he feels there is much to be said for the more informal German system.

Another difficult situation according to Nicholson is where the child is adamant about what he or she wants, but it may be that this is due to the child appreciating that one of their parents has a particular need for support from the child, for example because of alcoholism or other illness. In such a case, Nicholson suggests a judge may take account of the child's view, but would not give it determinative weight.

In regard to specific training for judges, Nicholson acknowledges that judges in Australia have usually been skilful and successful legal practitioners prior to their appointment. However, the role of judge is very different from legal practice, and he suggests a judicial tendency can be detected where some judges assume they have 'done it all' and really do not need a lot more training. Nicholson supports the notion that a judge's practical legal experience needs to be coupled with better judicial education in many areas. In his view, the issue of how to interpret and deal with children should be the subject of quite significant judicial education because only a few judges would have had significant prior experience in this field.

Nicholson noted that a judicial educational experience regarding gender issues was conducted some years ago. It was very much directed at the danger of judges their using own experience in the interpretation of evidence; in his view this challenged many of the participants, but the majority found it to be extremely helpful. This lesson can also be transferred to other areas and no doubt greater training in relation to interviewing children would aid in avoiding the reliance of judges on personal experience.

Nicholson does not suggest that judges should be educated on these issues to the point of becoming experts in their own right but they should develop a significant understanding of the issues and be able to communicate with children to the point of putting them at their ease.

As noted by Nicholson, one of the greatest difficulties faced by judges is not having sufficient material before them to decide a matter. With the LAT judges now have the opportunity of identifying where there is insufficient evidence and what evidence they would like. This would be the case where there is conflicting evidence; so if a

[35] See also M Fernando, note 2 above, pp 51-52.

Family Consultant's report conflicted with what the child said in a judicial conference, this could be explored further with the consultant in court. In the case of children's wishes, the judge has to take account of the child's age and there are situations where the information can be obtained without the need for direct recourse to a child. However, Nicholson thinks that when assessing an important matter, for example, the relationship between a parent and a child, one must be cautious about relying on third party evidence. In other words, as Nicholson identifies, there are significant benefits to judicial conferencing. Overall, and notwithstanding the difficulties involved, Nicholson reports no instances in which he regretted interviewing a child (which was normally in unusual circumstances in any event) and noted that were he hearing cases now, his preference would be to interview children much more frequently.

In this regard it is of interest to note a recent article by Justice Robert Benjamin of the Family Court of Australia in which he supports the desirability of judges interviewing children in appropriate cases and discusses his own experiences of doing so[36]. It is apparent that his experiences accord with those of Nicholson and in the cases to which he refers, the judicial conference was a vital component in arriving at a satisfactory conclusion in the cases in question.

Benjamin makes an interesting comparison with the different approach of New Zealand judges to this issue[37]. While to some extent he puts this down to subtle but important legislative differences, he also highlights judicial critique in that country of the use of an adversarial system in resolving parenting disputes[38]. Notwithstanding this, it is apparent from Benjamin's article that he does not feel that an Australian judge is unduly constrained from conducting a judicial conference and he has obviously done so with success.

Conclusion

The difficult application of the 'the best interests of the child' concept poses problems in deciding some very practical, and fundamental, aspects of a child's life, most usually with which parent the child is to live and when. Maximising the right of children to express their wishes and views should be of great assistance in deciding these matters. This, however, does not seem to be sufficiently appreciated.

Almost invariably in Australia, the process is for a third party to talk to the child and then convey the child's views and wishes to the court. The advantages of such a system are obvious; the most important one being that the child is affected as little as possible by the sometimes highly adversarial situation between the parents. The disadvantage on the other hand is that the wishes and views of the child are filtered through a third person, who is inevitably interpreting what the child is actually saying – and in doing so that person is very often interpreting that evidence in light of what that person thinks are that child's best interests. That is a decision for the judge. This is precisely why hearsay evidence was not generally permitted in the past. However, simply because hearsay evidence is admissible for children, this does not mean we should throw the baby out with the bathwater. The judge will want to hear the views of the Family Consultant or ICL as to the child's best interests, but that is no reason for not hearing the views of the child directly, just as the parents have the opportunity to put their case directly. Moreover, even if a different decision does not result, there are benefits for some children in simply being permitted to participate in a decision-making process that fundamentally concerns them.

There will of course be many cases where a child's views will not be crucial to a decision; however this does not mean that interviewing children should be disregarded in cases where the judge feels unsure of the true feelings of the child (for example where the child may not have understood the significance of their comments to a decision) or that further input from the child may assist in their decision making.

Providing advanced training for judges to be able to handle and interpret such interviews appropriately is a small price to pay for the advantages for the child (both emotionally and in terms of the decision) if the judge speaks with the child directly. Doing this in a formal way in a courtroom could, of course, be a very frightening situation for the child. However, in Australia, the judge can adopt any method they choose, including meeting out of the court. The judge can ensure the child understands the significance of the meeting, and the child can be protected from the more severe setting of the courtroom.

In reflecting on the best processes to advance children's interests in family law, it cannot be ignored that there is mounting evidence that children's interests are advanced by more direct participation. Nicholson's experiences support this conclusion and give reason to expect that

[36] Benjamin, Justice Robert, Judges receiving evidence directly from children, (2012) 2 *Fam L Rev*. 99.

[37] See also the discussion in M Fernando, note 2 above and the research referred to therein in relation to New Zealand.

[38] See the discussion in M Harrison, note 33 above, pp 36-38.

more positive outcomes can be achieved for both children and parents. Nicholson sees the greater inclusion of children in the process as a way of minimising the effect of natural bias in decision making, assisting in what are the most difficult cases to decide, improving the likelihood of the better parenting outcome being chosen and affirming children's rights to be heard fully when a matter concerns them. This would also reduce the possibility of the process seeming arbitrary in the sense that all relevant information is not properly considered.

As a by-product, Nicholson notes that there is an increased possibility of parental satisfaction (and indeed agreement) through the use of interviews. Nicholson's experiences do not suggest that parents are hostile to the judicious use of interviews and, providing judges are sensitive to adverse consequences for children of disclosure of information, there is every reason to suspect that parents will benefit from greater use of interviews. As we have seen, Nicholson's experiences support the view that children benefit personally from being included in the process, beyond the question of what ultimate decision is taken. Indeed, one might question why, if a child particularly wishes to, they would be denied the opportunity of talking to a judge; it seems obvious to suggest this could be more detrimental to children than the risks associated with interviews.

Against this backdrop, it is difficult to see why judges in Australia remain so reluctant to talk directly to children; even when they express interest in the practice they rarely do so.[39] Nicholson's experiences – and he was the senior judge in the court for many years – do not illuminate the true reason for this judicial reluctance. Nicholson indicated that judges espoused procedural fairness and lack of judicial skill in interviewing children as their driving motivation. However, as we have seen, these are not insurmountable barriers to the practice. Procedural fairness can already be addressed, and further rules could be adopted. Appropriate interviewing skills are a matter relevant both for third parties interviewing children and judges and there is no reason why similar training for both could not be provided on a regular basis. While the judge does not have a social science background, nor do police officers, for example, who have to interview children. Parenting disputes are core business for the family court; what could be more important than education for judges in this area? Judges will come to the job with the legal skills to act for a party but in making a decision about a child's life it is entirely appropriate that, as Nicholson suggests, considerable effort should be devoted to up-skilling judges in this way.

So far as the future of the less adversarial trial is concerned, for the reasons already discussed, we think that its future is inextricably bound with judicial conferencing. It may be that the Australian judicial reluctance to interview children reflects a continuing tie to the traditional adversarial model. It is interesting to note that in the family and the broader children's jurisdictions at least there is evidence of the beginning of a more general acceptance of moving away from this traditional approach. We have mentioned the situation in New Zealand where both less adversarial style trials and judicial conferencing are becoming increasingly more accepted.

> The Australian and New Zealand trial models have similarly been adopted in Singapore, which has worked closely with the Family Court of Australia over many years. Very recently in the State of Victoria, Australia, a public inquiry into the State's child justice system found:
> [The VLRC (Victorian Law Reform Commission) found] that the conduct of matters under Division 12A of the Family Law Act is an excellent model. The Inquiry agrees and considers that the model should be adapted for inclusion in the Act. The Inquiry endorses the VLRC report's recommendations regarding the LAT model of the Family Court (VLRC 2010, pp. 314-317)...
> The Inquiry recommends that the Children's Court be empowered, through legislative amendment, to conduct matters in a manner similar to the way in which the Family Court of Australia conducts matters under Division 12A of the Family Law Act[40].

It is to be hoped that in the future this child friendly model of family litigation will gain increasing acceptance and that it will increasingly be coupled with judicial conferencing as an integral aspect of its operation.

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[39] M Fernando, note 3 above, p 76.

[40] Report of the Protecting Victoria's Vulnerable Children Inquiry, State of Victoria, January 2012, Chapter 15.4, *The Less Adversarial Trial Model*, http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html (accesssed 15 November 2012).

2. The Voice of the Child in Swedish Family Law

Eva Ryrstedt* Lisa Young and Alastair Nicholson*****

Introduction

Different jurisdictions have adopted varying approaches to the issue of whether, and how, children might participate in parenting decisions concerning them. This is despite the fact that many of them operate within largely similar legislative regimes. The best interests principle[1] is widespread and there is great similarity in the various considerations courts will take into account when determining a child's best interests. This begs the question of why there is such divergence in practice in relation to children's participation in these cases.

In Sweden, older children technically can (but in practice do not) appear in court to provide information. Moreover, judges may never talk directly with a child outside of the courtroom[2]. As in many other jurisdictions, the wishes and views of children are routinely brought into court through the use of reports by social scientists (Social Services Reports). This remains the case notwithstanding that in Sweden there is a degree of parliamentary support for greater participation of children in family court matters[3]. Sweden has not, however, made any legislative moves towards enabling, or arguably encouraging, direct participation of children. One question facing those advocating reform in Sweden is whether greater direct participation could be achieved simply by providing the necessary processes; that is, would legislation permitting and regulating the direct participation of children effect any real change in practice?

This note outlines the legal position in Sweden in relation to the participation of children in family court cases and then considers the potential for legislative reform to increase direct participation of children in Sweden, in light of the experiences in Germany, New Zealand and Australia.

The participation of children in Swedish family court cases

The child's right to be heard in family law matters is closely connected with the dominant 'best interests of the child' principle – so closely they might be said to be intertwined. The starting point for discussion of this topic is routinely noted to be Art. 12 in the United Nations Convention on the Rights of the Child (CRC): this recognises a right of participation, though not specifically direct participation:

> 1.States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In the Swedish legislation, the best interests of the child are stated to be the 'decisive' factor in making a parenting order. While there is no extensive best interests checklist as in some other jurisdictions[4], a few factors are identified as being relevant to the exercise of this discretion, including the wishes of the child. The legislation specifically states that a child's wishes are to be taken into consideration in accordance with the child's age and maturity[5].

However, this provides little more than a guiding principle, and gives no assistance in determining when the views of children should be discounted based on their

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[1] That is, the notion that the child's best interests will be the overriding consideration in a parenting decision concerning them.

[2] See RH 1999:76.

[3] See E Ryrstedt in Barnets bästa och vilja, Svensk Juristtidning 2009, pp 1017-1018.

[4] For example, see s 60CC of the Australian Family Law Act 1975 (Cth).

[5] The Children and Parents' Code (Föräldrabalken (1949:381)), chapter 6, section 2a.

young age or how much weight is to be attributed to the views of children at different ages[6]; it certainly does not say anything of how the wishes are to be obtained and presented in court.

This leaves open the question of whether the overriding legislative intention is to permit children to be active participants in family court, or whether, instead, the pre-eminent concern is the perceived protection of children by keeping them out of court, therefore requiring their views to come through expert third parties[7]. In the same chapter of the law, it does say, however, that the court is responsible for an appropriate investigation into the case. The courts in Sweden normally fulfil this obligation through assigning to the Social Welfare Board the responsibility of preparing a Social Services Report[8]. It is expected that the wishes of a child will be explored in such a report. However, the brevity of the legislative provisions presupposes that this is a simple task requiring little direction.

The importance of paying greater regard to the rights and interests of children has been increasingly recognised over recent years in Sweden and *traveaux préparatoires* to amendments to the Code in 2006 highlight the significance of children being able to express their views in a Social Services Report[9]. They also recognise that there is a lack of transparency in the reports and in the judgments in terms both of how those views have been captured and the extent to which they influence the decision making process[10]. The reports have been subject to criticism regarding quality, objectivity and the skill of those preparing them[11].

Notwithstanding that studies of Swedish court cases and of Social Services Reports, from 1999 and 2002, have shown that the wishes expressed by children are often accounted for in the Social Services Reports, the reports expressly recommend that the outcome should accord with the child's wishes in only about half of the cases and subsequently they are only mentioned in about half of the court decisions[12]. Thus, even though children's wishes are being taken into account in most reports, they cannot be said to play a defining role in the outcomes. This point has been argued in a recent study of published 'guiding'[13] court cases from the Supreme Court and the Appeal Court, decided between 1 October 1998 and 3 June 2009. However, an even more significant finding of that study is that while the reports may – as seen in previous studies – recite the child's views and also in many cases take them into account, the reports arguably fail when it comes to explaining what impact an expressed view should have on the outcome, as well as failing to give the child information that is a prerequisite to them having an informed understanding of their right to express their wishes[14].

This indicates that the court process continues to lack transparency, notwithstanding the identification of this as a problem in the 2006 *traveaux préparatoires*.[15] A lack of transparency poses a special problem when it comes to assessing the extent to which a child has been able to express his or her view on a family law matter concerning them. This Swedish study concluded that children are not heard in the way intended by the legislation. Not only do the Social Services Reports pose a problem, but decision makers also seem to struggle with the lack of legislative direction as to how to incorporate a child's wishes[16].

The processes adopted in preparing a report, and the interpretation by the court of those reports, are crucial, as the opportunity for children to present their views to the court directly are extremely limited, with very stringent rules being applied[17]. Indeed, in practice, this is very rarely done, and, as indicated above, judges are not permitted to meet with children outside of the court. Thus, the court is left with only the Social Services Report from which to ascertain the wishes of the child, and there are widely varying practices in preparing such reports and no unifying guidelines for the preparation of the reports to ensure consistency.

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[6] Compare Prop. 2005/06:99, Nya Vårdnadsregler, pp 45-46.

[7] For a discussion of this issue see E Ryrstedt, The Child's Right to speak in Matters concerning Custody, Residency or Access in M Martin-Casals and J Ribot (eds) *The Role of Self-determination in the Modernisation of Family Law in Europe*, Girona, 2006, p 223, with further references.

[8] Children and Parents' Code, ch. 6, sec. 19.

[9] Prop. 2005/06:99, p 45.

[10] ibid, p 40.

[11] Socialstyrelsen, Glimtar av barn från vårdnads-, boende- och umgängesdomar 1999 respektive 2002, p 7.

[12] SOU 2005:43, pp 210 and 750. Socialstyrelsens rapport Socialstyrelsen, Glimtar av, pp 31-34. Regarding the number of children visible in court cases, compare L Dahlstrand, Barns deltagande i familjerättsliga processer, eg p 207.

[13] While the doctrine of precedent does not, of course, apply in Sweden in the same was as a common law country, it is normal practice for lower courts to follow these published 'guiding' decisions.

[14] E Ryrstedt, Barnets bästa och vilja i domstol, SvJT 2009, p 1034.

[15] ibid, p 1035.

[16] Cf. E Ryrstedt, Barnets bästa och vilja i domstol, SvJT 2009.

[17] See eg Children and Parent's Code (Föräldrabalken 1949:841) chapter 6, section 19, para 6.

In Sweden, therefore, it has been argued that the practices being adopted do not comply with the intent behind the legal provisions and that the legal provisions themselves are not sufficiently detailed[18]. Much could be done to improve the situation; one obvious change would be to adopt a consistent method of investigation. Presuming a robust method is adopted this would have the potential to better represent the voices of children in family law proceedings, as well as providing the incentive for greater collaboration between social workers and improved training opportunities.

This would not, however, address the issue of the direct participation of children in family law proceedings. While this is not required under CRC Art. 12, there is increasing evidence that direct participation has the potential to deliver significant benefits, both in terms of improving outcomes and, even when not affecting an outcome, for the emotional wellbeing of the child[19]. If Sweden is committed to reform in this area to improve overall outcomes for children, then arguably the direct participation of children is something to which serious consideration should be given.

Is legislative reform the answer? The experience in other jurisdictions

The stark contrast in practice that can be seen in other jurisdictions where direct participation is possible highlights the possibility that legislative change in and of itself is unlikely to be a sufficient catalyst for change.

Both Germany and New Zealand present examples where direct participation of children is a common feature of family court proceedings. German procedures in children's disputes proceed as follows:

- Upon a case being filed by a parent the judge causes to be served on the other parent a written motion, requesting a response;
- The Youth Office receives the motion simultaneously and is requested to file a report;
- The judge summons the parents and children to a court appointment and henceforth endeavours at all stages to bring the parties to an agreement;
- The judge often talks to the children first, in the absence of the parents and then together;
- The judge then discusses the issues with the parents and a social worker from the Youth Office, if present. The content and outcome of the judge's conversation with the children is conveyed to the parents who then explain their respective positions followed by their legal representatives and the Youth Office representative. If agreement is reached at this stage it is recorded and is binding unless the judge considers that it conflicts with the children's best interests[20].

It can be seen that a critical aspect of the German procedure is the involvement of the judge with the children from the outset. Further, this is not done in a formal setting but in a much more relaxed environment which may involve a specially designed room where children will feel more comfortable or even outside in a park or cafe.

As Fernando has noted, New Zealand has also seen significant direct participation of children in family court, much more so than its near neighbour Australia. In her view, a key reason for this is strong judicial support for this concept in New Zealand[21]. Benjamin, an Australian family court judge in favour of direct participation of children, notes that, when compared to Australia, there has been a long standing difference of judicial approach in New Zealand. By the late 1990s New Zealand Family Court judges, including the present Principal Family Court Judge, were expressing themselves in terms highly critical of the adversary system's suitability in respect of family law cases[22]. Benjamin also refers to the provisions of CRC Art. 12.2, which is given expression in the relevant New Zealand legislation where it is provided that:

> (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
>
> (b) any views the child expresses (either directly or through a representative) must be taken into account[23].

Australia also has legislation which permits direct

[18] See E Ryrstedt, note 16 above.

[19] M Fernando, 'Conversations between judges and children: An argument in favour of judicial conferences in contested children's matters' (2009) 23 AJFL 48.

[20] M Harrison, *Finding a better way: A bold departure from the traditional common law approach to the conduct of legal proceedings*, Family Court of Australia, 2007 available at www.familycourt.gov.au (accessed 8 January 2013).

[21] M Fernando, note 19 above, pp 53-54.

[22] See the discussion in M Harrison, note 20 above, pp 36-38.

[23] *Care of Children Act 2004* (NZ), s 6(2).

participation by children, and yet it is extremely rare in that jurisdiction[24]. However, as Benjamin points out, unlike in New Zealand, Art. 12.2 is not directly reflected in Australian legislation; in Australia, a child's views (if any are expressed) are one of many factors in a list that are taken into account by a judge in determining where and with whom a child will live[25]. While Benjamin J is correct in this regard, there is a body of case law in Australia which gives great weight to children's views[26] and in the absence of any contrary provision there is no reason why an Australian judge should not have regard to Art. 12 of CRC.

So, while not as strong as the New Zealand legislation in encouraging the participation of children, Australian legislation makes 'judicial conferencing' (as it is referred to there) a real possibility, both within and outside the court precincts. However, recent research in that jurisdiction by Fernando[27] confirms that there is a strong (and long standing) judicial disinclination to engage in the practice, even by judges who accept its potential benefits. Even the introduction of a 'less adversarial' model of resolving parenting disputes[28] has not seen any increase in direct participation of children. Nicholson suggests this may be in part due to a continuing attachment to a traditional adversarial manner of litigation, even in parenting disputes[29]. Indeed, the experiences in these three jurisdictions would suggest that the stronger the judicial tie to the adversarial model, the less likely there will be direct child participation in proceedings.

Where to for Sweden?

The experiences in other jurisdictions therefore indicate that simply relaxing the stringent rules on direct child participation may well be insufficient if the Swedish judiciary are as reluctant as, say, Australian judges to embrace the opportunity to talk to children. Given the practice to date in Sweden of excluding children from court, and the fact that the Swedish judiciary are not seeking to drive change in this area, one could predict that a permissive regime – that is, permitting but not requiring the direct involvement of children – will bring little actual change. Any judicial discretion is likely to be exercised in such a way that the direct participation of children will be a rarity.

It would seem therefore that a there are two possible paths for Sweden. The first would be to improve the system in place. While this could improve outcomes for children on one level, as indicated above, it would not address the question of children's direct participation. To achieve greater direct child participation in parenting disputes it seems there would be three necessary steps. First, the Code would need to be amended both to permit direct participation within and outside the court precincts, and to emphasise the right of children to participate in proceedings that concern them, where such participation would be in their best interests. Second, the process by which children would participate should be prescribed. Of course, children would not be required to express their views to a judge but rather all children would be given the opportunity to do so under certain specified conditions. This would not preclude the continued use of Social Services Reports which could continue to explore children's wishes and would provide a useful adjunct to judicial interviews of children. This is no different to a judge taking direct evidence from a parent as a witness and also taking expert evidence from a third party on the same issue. As Fernando argues, this will just help ensure the judge has the best, most up to date evidence before them[30]. Finally, a significant program of judicial education would be essential to ensure judges were well trained for the task of interviewing children[31] as they would inevitably have little experience in this regard. Thus, only with a comprehensive approach to the question of children's participation in family law cases can Sweden (or indeed other countries facing the same dilemma) hope to achieve significant gains for children.

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[24] M Fernando, 'What do Australian family law judges think about meeting with children' (2012) 26 AJFL 51.

[25] Family Law Act 1975 (Cth), s 60CC(3).

[26] See for example *Marriage of Joannou* (1985) FLC 91-531 and *Harrison and Woollard* (1995) 18 Fam LR 788.

[27] M Fernando, note 24 above.

[28] The Family Court of Australia website says that this model, which gives the judicial decision maker considerably more control over the way the case proceeds, is 'focused on the children and their future; flexible to meet the needs of particular situations; expected to cost less and reduce the time spent in court; and less formal and less adversarial than a traditional trial': www.familycourt.gov.au (accessed 8 January 2013). It is notable that this description of the process refers to the benefits parents derive from talking directly to the judge, but does not refer to that happening for children.

[29] Young, Ryrstedt and Nicholson, 'The Child and the Judge: Reflections on the Voice of the Child in Australian Family Court Parenting Disputes' (2012) 3 FLP 1.

[30] M Fernando, note 19 above.

[31] See the discussion of this in Young, Ryrstedt and Nicholson, note 29 above, (2012) 3 FLP 1.

The Voice of the Child in South Africa

1. Children's Representation in South Africa

A note on child representation in South Africa in relation to the Hague Convention on International Child Abduction

Does the South African Children's Act create an automatic right to a *child* to have legal representation in Hague Proceedings?

Roshnee Mansingh*

1. The Hague Convention on the Civil Aspects of International Child Abduction 1980, ("the Convention"), is incorporated into South African law by the Children's Act 38 of 2005 ("the Act").

2. The sections of the Act relating to the Hague Convention came into operation on 1 April 2010.

3. Section 279 of the Act provides as follows, *"A legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abductions."*

4. Section 55 of the Act reads as follows:

   "(1) Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 (Act No 22. of 1969).

   (2) The Board must deal with a matter referred to in section (1) in accordance with section 3B of that Act, read with the changes required by the context." [1]

   There is thus a **statutory duty on the Legal Aid Board** to provide legal representation for the minor child if two grounds are satisfied, (a) the court is of the opinion that it is in the best interests of the child that legal representation be appointed and (b) the means test is satisfied.

5. There is also a **constitutional duty on the Legal Aid Board** in terms of section 28(1)(h) of the Constitution of the Republic of South Africa Act 108 of 1996, to provide a legal practitioner for the child in civil proceedings at state expense, if substantial injustice would otherwise result[2].

6. Left behind parents often seek wide ranging investigations on domestic circumstances of the child in both South Africa and the requesting country: on the disputing parties' current circumstances and the best interests of the minor child with regard to his primary place of residence, the parental responsibilities and rights of the applicant and the respondent, including but not limited to rights of contact; and that costs be paid by the Central Authority of the Republic of South Africa.

7. Issues for Concern are:

   7.1. Costs of the legal representative. There is no duty on the Central Authority of the Republic of South Africa to cover the costs of legal representation for the child. If appointed, costs must be borne by the Legal Aid Board on the two bases set out above - the statutory and constitutional imperatives. Further, a legal representative can be appointed on a *pro bono*

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[1] This is the means test.

[2] *Legal Aid Board v R* 2009 (2) SA 262 (D).

basis which would entail no costs. Alternatively, a practitioner from the Legal Aid Board can be appointed which would entail no costs to the parties.

7.2. Choice of Legal Representative. There is no need for the respondent to have a right of choice of a specific person to be appointed as a legal representative for the child. The Legal Aid Board has very well qualified, competent and willing attorneys who are able to compile a report expeditiously[3].

7.3. Legal representation for the minor is not expressed as an automatic right on demand. The Court must hold a view that it is in the best interest of the child to make such an appointment. Proof of distinct and discrete right or interest of the child is thus required.

Section 55 of the Act is prescriptive, that an appointment of a legal representative for the child is not automatic *but the court must first find that it is in the best interests of the child to have legal representation*.

Further, it is argued that a distinct and discrete right or interest that the minor child has, separate from that of the contesting parties and that is not already before the court, is necessary to warrant separate legal representation. An example would be that the contesting parties have failed to place before the court vital information on detrimental living conditions of the child in either of the disputing parents' living environments or in older children when the child has an objection either to the return.

To hold otherwise, would be to introduce a new defence to the Hague Convention, that of the best interest of the child, thereby frustrating the Convention's objectives and purpose, and thus substituting a new test overriding the paramountcy of the principle of the child's welfare with that of a *best interests of the individual child*.

In most Hague Convention cases, there is no discrete and distinct right. The rights and interests flow from the Hague Convention and such rights and interests are common to all parties, including the section 13 Hague Convention defences - that the child is not subject to grave harm or intolerable circumstances.

Although, s279 includes the word "must", it has to be read with s55 of the Act. The section must serve a legitimate purpose and not serve merely to delay and frustrate the operation of the Convention. Thus, a discrete and distinct interest or right of the child ought to be present before an appointment is made.

7.4. Scope and Mandate of Legal Representative & Best Interest test

Often, a broad and wide ranging investigation is sought by the respondent. Respondents confuse two sections of the Children's Act, ss 278 and 279.

Section 279 provides for a legal representative for the child, whilst s 278 provides for a report on the domestic circumstances of the child prior to the abduction.

Respondents seek a full investigation into the primary place of residence and parental responsibilities, including rights of contact: this seems more like a custody and access investigation rather than a report in a Hague Convention matter.

This raises grave concern on the following factors:

- Cost of the investigation.
- Time Frame for it to be carried out.
- Scope of Report: does this include consultations with the Central Authority in the requesting country?

It is imperative to limit and define the precise scope and mandate of any appointment, once found to be necessary. Further, on a domestic report - that is under s278 - the Central Authority would do this if a proper case was made out for it. The disputing parties simply conflate the two sections into one.

8. The Children's Act does not therefore create an *automatic* right to a legal representative for the child.

[3] *e.g. B and Others v G* 2012 (2) SA 329 (GSJ).

2. South African Experiences in Implementing and Devloping Children's Right to Legal Representation in Family Law Disputes:

A Historical and Theoretical Perspective on Children's Representation in South Africa

Carina du Toit*

1. Introduction

The child's right to participate and concomitantly to be assigned a separate legal representative in civil family law matters was envisioned by South African legislators as far back as 1979 when section 6(4) was included in the Divorce Act 70 of 1979. Section 6(4) empowered a court seised with a divorce matter to appoint a legal representative for the child concerned in the divorce and to order the parties to pay the legal costs of the child's representative. Unfortunately, section 6(4) of the Divorce Act was not utilised by courts to appoint a separate legal representative for children but was more often used to appoint a curator *ad litem* for children[1].

It was only after ratification of the United Nations Convention on the Rights of the Child and the advent of the Constitutional era in South Africa that section 8A was included in the Child Care Act 74 of 1983. Section 8A of the Child Care Act set out in detail how a legal representative may be appointed for children involved in care and protection proceedings in the Children's Court. Section 8A was never brought into operation and remained on the law books without effect until it was repealed by the new Children's Act 38 of 2005[2].

The review of the Child Care Act conducted by the South African Law Reform Commission resulted in recommendations for extensive provisioning of legal representation for children in the new Children's Act 38 of 2005[3] in order to give effect to section 28(1)(h) of the Constitution – which entrenches children's right to legal representation in civil matters – and the international law. The recommendations specifically listed the situations when legal representation should be appointed for children[4]. The recommendations were not included in the final Act. However, the Children's Act does allow for the appointment of legal representation for children even though the empowering provision is much weaker than was envisioned by the Law Reform Commission. This article discusses how case law has developed children's right to participate in family law disputes through a separate legal representative in light of the prevailing constitutional, international and domestic law.

2. International Law

The basis of the child's right to participate in all matters that affect the child emanates from international law, specifically the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child[5]. The United Nations Convention on the Rights of the Child[6] is a comprehensive international law instrument which identifies children as the individual bearers of rights. The four key principles of the UNCRC have been identified as protection, prevention, provision and *participation*. The concept of children's rights to participation recognises that children are autonomous individuals with

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[1] Kassan 'Children's right to legal representation in divorce proceedings' in Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) p 227.

[2] Kassan in Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* p 229.

[3] Hereafter 'Children's Act'.

[4] Kassan in Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* p 230.

[5] Section 39(1)(b) of the Constitution requires that when interpreting the Bill of Rights, a court must consider international law. Section 233 provides further that when interpreting legislation, any court must prefer any reasonable interpretation of the legislation that is consistent with international law. South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995. The African Charter on the Rights and Welfare of the child was ratified by South Africa on 7 January 2000.

[6] Hereafter referred to as UNCRC.

fundamental human rights, and views and feelings of their own in matters concerning them[7].

Article 12 of the Convention on the Rights of the Child entrenches the child's right to participation and reads as follows:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12(1) entrenches children's general right to express their views in all matters affecting them. Section 12(2) provides more specifically that the child must be heard in certain proceedings affecting him or her. The words 'shall assure' in article 12(1) and 'shall in particular be provided' in article 12(2) indicate that there is an obligation on States to provide the child with an opportunity to participate in proceedings in order to express their views should the child want to participate[8]. Article 12(2) specifically provides that the child should be given an opportunity to express his or her view during formal proceedings including legal proceedings[9].

The African Charter on the Rights and Welfare of the Child[10] guarantees several participation rights but most importantly entrenches the child's right to be heard in all judicial and administrative proceedings in article 4(2).

> In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

A significant difference between article 12 of the UNCRC and article 4(2) of the ACRWC is that article 4(2) creates a mechanism through which the child may place his or her views before the court in that the ACRWC gives the child the right to be 'as a party to the proceedings'.

The UNCRC and the ACRWC make mention of allowing the child to participate, directly or indirectly, through the appointment of a legal representative. Children's right to participate can be given effect to in various ways. For instance, children have a right to participate in mediation in relation to a parenting plan. Appointing separate legal representation for a child may be seen as a form of participation and will not be necessary in every matter concerning the child[11].

3. Constitutional Law

The most important right in South African law in respect of child participation is section 28(1)(h) of the Constitution which states that:

> Every child has the right to have a legal practitioner assigned to the child by the State and at State expense, in civil proceedings affecting the child, if substantial justice would otherwise result.

Section 28(1)(h) only mentions the appointment of a legal practitioner for a child and does not refer to any broader right of participation attaching to children[12]. Section 28(1)(h) refers to the assignment of a *legal practitioner* and does not use the terminology of the UNCRC or the ACRWC which refers to a 'representative'. However, section 28(1)(h) has been interpreted by the Constitutional Court in conjunction with the international law to include and give effect to children's right to participation[13]. The Constitutional Court has indicated in various cases concerning children that it is imperative that children's interests be protected when

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[7] *The Right of the Child to be Heard* Committee on the Rights of the Child General Comment no 12 CRC/C/GC/12 20 July 2009.

[8] Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 219-220.

[9] Van Bueren *The International Law on the Rights of the Child* (1995) p 137.

[10] Hereafter referred to as ACRWC.

[11] Davel in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* 18.

[12] Friedman, Pantazis and Skelton 'Children's Rights' in Woolman et al (eds) *Constitutional Law of South Africa* (2007) p 47-28.

[13] *AD and another v DW and others (Centre for Child Law as Amicus Curiae)* 2008 (3) 184 (CC) para 38 and n20; *Bhe and others v Magistrate, Khayelitsha and others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC) para 55; *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) p 375H-J; [2003] 2 BCLR 111; *Du Toit and another v Minister of Welfare and Population Development and another (Gay and Lesbian Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) para 21 n21; *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 75.

they are concerned in a case before the court. The importance of child participation as enunciated by the Constitutional Court can be traced back to *Christian Education South Africa v Minister of Education*[14] where the court stated the following:

> There is one further observation to be made. We have not had the assistance of a curator ad litem to represent the interests of the children. It was accepted in the High Court that it was not necessary to appoint such a curator because the State would represent the interests of the child. This was unfortunate. The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.

In *Minister for Education v Pillay*[15] Chief Justice Lange made the following statement:

> Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In *Christian Education South Africa v Minister of Education* this court held in the context of a case concerning children that their 'actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure'. That is true for this case as well. The need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age who should be increasingly taking responsibility for their own actions and beliefs.

The child's right to be heard and to have his or her views taken into account, article 12 of the Convention on the Rights of the Child, and article 4(2) of the African Charter have been recognised in the High Courts and the Supreme Court of Appeal. The most significant case law to date can be found in *Soller NO v G*[16] and *Legal Aid Board v R*[17].

4. The Children's Act 38 of 2005

The child's right to participation was incorporated into domestic legislation in the Children's Act 38 of 2005[18], notably in section 10 of Chapter 2 of the Children's Act. It reads as follows:

> Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

The child's right to participate is a central theme in the Children's Act and the Children's Act throughout provides opportunity for the child to participate and to express his or her views[19]. In terms of section 55, the Legal Aid Board[20] may appoint a legal representative for children involved in Children's Court proceedings[21]. The court cannot order that legal representation must be provided but may refer the matter to the Legal Aid Board for consideration. The Legal Aid Board will then consider whether it is necessary to assign a legal representative to the child. However, section 55 of the Children's Act pertains only to proceedings in the Children's Court and does not extend to proceedings in the High Court where

[14] 2000 (4) SA 757 (CC) p 787.

[15] 2008 (1) SA 474 (CC) p 494E-G. This matter concerned a fifteen your old Indian girl who wanted to wear a nose-stud to school in contravention of the school dress code. The child's mother instituted litigation in her own name on behalf of the child.

[16] 2003 (5) SA 430 (W) p 434–435.

[17] 2009 (2) SA 262 (D).

[18] Hereafter Children's Act.

[19] Section 31 of the Children's Act obliges any holder of parental responsibilities and rights to consider the views and wishes of the child when making any decision. Section 61 obliges a presiding officer in a Children's Court to give the child an opportunity to participate. The child is given a choice as to whether he or she wishes to participate and the presiding officer must enter the reasons why a child does not participate into the record of the proceedings. An adoptable child who is ten years or older must consent to his or her own adoption in terms of section 233.

[20] The Legal Aid Board was established in terms of the Legal Aid Act 22 of 1969 and provides legal aid to indigent persons.

[21] See also *Legal Aid Board v R* 2009 (2) SA 262 (D) and *Legal Aid Board: In re four children* [2011] ZASCA 39 (29 March 2011) for an analysis of Legal Aid South Africa's powers to assign legal representation for children.

divorces and care and contact disputes are litigated. However, there is nothing that prevents a judge presiding in the High Court to exercise his or her inherent jurisdiction as the upper guardian of all children to appoint a legal representative in terms of section 28(1)(h) of the Constitution[22].

5. Interpretation by the Courts of the Child's Right to Be Heard

As set out above, the child's right to have separate representation during legal proceedings is clearly included in the ambit of article 12(2) of the UNCRC. Article 4(2) of the ACRWC states that the child must have an 'impartial representative as a party to the proceedings' which would place the child's representative on even footing with the other parties. However, implementation of the child's right to be heard has developed very slowly in South African courts and it is still novel in court proceedings to hear the child directly through their own representative[23]. It is generally accepted that the views of the child is sufficiently canvassed by psychological or social work experts involved in the case or by the Office of the Family Advocate[24].

Since the late 1990's there has been growing recognition of the need for courts to ascertain the views of the child involved in the dispute. It is clear from such decisions as *French v French*[25], *Manning v Manning*[26] and *Märtens v Märtens*[27] that, if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference[28].

In *Lubbe v Du Plessis*[29] Van Heerden J pays specific attention to the preferences of the children stating that children have a right to participate in proceedings that affect their lives in terms of article 12 of the Convention on the Rights of the Child. If a court is convinced that a child has the requisite maturity to express his or her preference then the court is obliged to give serious consideration to the child's views and wishes. Taking the views of the children into consideration is essential for a presiding officer to make an informed decision on what would be in the best interests of the child[30].

In the recent matters of *J v J*[31] and *HG v CG*[32] the presiding judge attached significant weight to the wishes of the children involved. In *J v J* the judge was called on to make a decision in respect of the child's education. The child had been repeatedly subjected to psychological assessment. The child had complained to the psychologist that he was not a 'lab rat' to be subjected to continuous testing[33]. In addition to the testing the child had been the subject of drawn out, 'endless' litigation[34]. The judge gives considerable consideration to the child's wishes and orders that the 'child be allowed to settle down without further litigation, assessment and investigation'[35].

In *HG v CG*[36] the mother, and custodian parent, applied to the High Court for consent to relocate with the children to Dubai for three years. The father opposed

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[22] Legal Aid Board: In re four children [2011] ZASCA 39 (29 March 2011); Brossy v Brossy [2012] ZASCA 151 (28 September 2012).

[23] Skelton 'Special Assignment: Interpreting the right to legal representation in terms of section 28(1)(h) of the Constitution of South Africa' in Sloth-Nielsen & Du Toit Z (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* 219; Davel in Nagel (ed) Gedenkbundel vir JMT Labuschagne 15.

[24] *F v F* 2006 (3) SA 42 (SCA). In the matter of Fitchen v Fitchen unreported case no 9564 1995, Western Cape High Court, Cape Town, the court declined to appoint a legal representative for the children based on the fact that the children's views and wishes were already sufficiently canvassed in the report by the Family Advocate and the psychological experts. See also Skelton 'Special Assignment: Interpreting the right to legal representation in terms of section 28(1)(h) of the Constitution of South Africa' in Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* 219.

[25] 1971 (4) SA 298 (W).

[26] 1975 (4) SA 659 (T).

[27] 1991 (4) SA 287 (T).

[28] *McCall v McCall* 1994 (3) SA 201 (C) p 207H-I.

[29] 2001 (4) SA 57 (C) 73.

[30] *Lubbe v Du Plessis* 2001 (4) SA 57 (C) p 73E-74B.

[31] *J v J* 2008 (6) SA 30 (C).

[32] 2010 (3) SA 352 (ECP).

[33] *J v J* 2008 (6) SA 30 (C) para 40.

[34] *J v J* 2008 (6) SA 30 (C) para 40.

[35] *J v J* 2008 (6) SA 30 (C) para 43.

[36] 2010 (3) SA 352 (ECP).

the application to relocate. Several expert reports were placed before the court in which the children clearly stated that they have a strong bond with their father and they do not wish to relocate to Dubai. Despite the children's clearly expressed views and wishes, the experts recommended that the children relocate with their mother. The experts involved in the matter recommended that the court should not take cognizance of the children's views[37]. Chetty J took exception to the recommendations of the experts and stated that ignoring the children's wishes would be in direct contradiction with the Children's Act[38]. The judge ultimately decided that he was obliged by the Children's Act to give effect to the views and wishes of the children as they were mature and old enough to make informed decisions[39].

6. The Right to Separate Legal Representation as a Form of Participation

Recent case law has shown a move towards allowing children actively to participate in litigation by means of their own legal representative, assigned in terms of section 28(1)(h) and as a party to the proceedings. Since the assignment of a legal practitioner to a child is still an uncommon practice in South Africa there are numerous questions around the actual practicalities of obtaining legal representation for children in terms of section 28(1)(h) such as: Who must decide to assign a legal representative for the child? How is the legal practitioner assigned? Who pays for the legal costs involved in representing the child? Who is qualified to represent children? Who decides whether a curator *ad litem* is required to direct the litigation or whether the children are capable of directing the litigation and should therefore have their own attorney? Are the views of the child placed before court on affidavit, through oral evidence, through reports by experts or can the presiding officer hear the child in chambers?

These questions become even more complex when considering the difference between proceedings when it is a divorce or care and contact dispute as opposed to when it is a child who may be in need of care and protection. Care and protection proceedings will invariably be in the Children's Court and typically deal with abused, neglected or orphaned children[40]. Divorce and care and contact disputes are mostly heard in the High Courts, although care and contact proceedings may also be heard in the Children's Court in terms of the Children's Act[41]. The change in forum will not make a difference though, as it is the nature of the proceedings that is significant and not the forum. During care and protection proceedings the proceedings are informal and inquisitorial whilst divorce and care and contact proceedings are characterised by their adversarial nature.

Essentially, there are four main issues to consider, namely: the circumstances under which a child is entitled to legal representation in terms of section 28(1)(h); who should be appointed to represent children under section 28(1)(h); who should appoint the section 28(1)(h) legal representative; and, finally, what is the role of the representative appointed under section 28(1)(h)?[42]

When should a legal representative be appointed in terms of section 28(1)(h)?

Section 28(1)(h) requires that a legal practitioner be assigned at 'state expense' when 'substantial injustice would otherwise result'. It is not clear whether 'substantial injustice' qualifies the whole section or just the part of the section that deals with state funding. In other words, does one have to show that 'substantial injustice would result if the child is not legally represented, irrespective of whether the legal representative is provided at state expense or through other means? Or, would one only have to show substantial injustice in the event that state funding is required to obtain the legal representation?[43] The majority of cases seem to indicate that there has to be some consideration of whether the child has a direct interest in the matter and whether it would lead to substantial injustice should the children not be assigned separate legal representation.

The matter of *Soller NO v G*[44] was the first reported case that dealt fully with the interpretation of section 28(1)(h). The court addressed the question of why the child needed separate legal representation and stated:

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[37] The eldest sibling was 14 and the set of triplets were 11.

[38] *HG v CG* 2010 (3) SA 352 (ECP) para 17.

[39] *HG v CG* 2010 (3) SA 352 (ECP) para 23.

[40] Section 45 of the Children's Act.

[41] Section 45(3) of the Children's Act.

[42] Kassan How can the voice of the child be adequately heard in family law proceedings? Unpublished LLM dissertation (2004) UWC 80.

[43] Kassan in Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* 229; Friedman and Pantazis 'Children's Rights' in Woolman et al (eds) *Constitutional Law of South Africa* (2ed ed) at 47-28.

[44] 2003 (5) SA 430 (W).

> I can envisage few proceedings of greater import to a child/young adult of K's age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a/ relationship with both living parents... The significance of section 28(1)(h) lies in the recognition, also found in the Convention on the Rights of the Child, that the child's interests and the adults' interests may not always intersect and that a need exists for separate legal representation of the child's views[45].

In C*entre for Child Law v Minister of Home Affairs*[46] the court reiterated the importance of legal representation for children in terms of section 28(1)(h) and ordered that legal representatives be appointed by the state for the children concerned. This case related to the rights and welfare of unaccompanied minors who did not have the assistance of a parent or guardian and were therefore more vulnerable. The court found that it was necessary to appoint legal representation for unaccompanied minors as there was a risk that their rights would be violated if they were not so represented which would lead to substantial injustice. Legal representation was limited to Children's Court proceedings.

In *R v H and another*[47] Moosa J appointed a legal representative for the child in terms of section 28(1)(h). Moosa J relied on section 12 of the UNCRC and stated that the Court is 'required to afford a child who is capable of forming a view on a matter affecting him or her, the right to express those views. Such views are to be given due weight according to the age and maturity of the child'. The judge considered the following factors in deciding whether there would be substantial injustice if the court does not assign a legal representative for the child: the drastic nature of the relief sought by the mother which would sever all contact between the child and his father; the possibility that the best interests of the child may not be compatible with the interests of the custodian parent; and the interests of justice required that the child's be articulated.

In *Ex Parte van Niekerk and another: In re Van Niekerk v Van Niekerk* Judge Hartzenberg held that:

> The father wants the court to find that the mother is unreasonable and influencing the children against him, whereas the mother wants the court to find the father a violent and mentally sick person. Both parents may be wrong. Only if the children or somebody on their behalf puts their case will a court have a balanced presentation of the situation[48].

In *Legal Aid Board v R* Willis J found that questions about where a child is to live and which parent will be making the most important decisions in the child's life, are of crucial importance for a child. It is the child who will be the subject of the decision and who must live with the consequences. It is therefore vitally important that her views are taken into consideration when making these decisions. When it is evident that the child's views are being drowned out by the warring parents, there will be likely to be a substantial injustice if a separate legal representative is not appointed for the child[49].

Wallis J went on to say that the appointment of a legal representative for a child would not only be helpful, it would allow the child to participate in the proceedings. The child had indicated to experts and the attorney appointed for her by the Legal Aid Board that she wished to express her own opinions and a previous judge had already pronounced on the need to appoint a separate legal representative for this child due to the level of acrimony in the litigation between the parents. It was therefore clear that there was a need to hear the child independently from her parents[50].

According to Sloth-Nielsen one has to consider the age and ability of the child to express his or own views, the complexity of the case and the likely impact of the final decision on the daily life of the child in order to determine whether substantial injustice would result if a legal representative is not appointed[51]. Kassan distils the following guidelines to consider whether a representative should be appointed in divorce matters: the presence of allegations of sexual, physical or emotional abuse; if the parents have been involved in lengthy and acrimonious litigation over care, contact and

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[45] *Soller NO v G and another* 2003 (5) SA 430 (W) 434-435 paras 7-8.
[46] 2005 (6) SA 50 (TPD) p 58I–59C/D and at 60I/J [10] of the order.
[47] 2005 (6) SA 535 (C) p 539.
[48] [2005] JOL 14218 (T) para 7.
[49] *Legal Aid Board v R* 2009 (2) SA 262 (D) p 269G.
[50] *Legal Aid Board v R* p 270A.
[51] Sloth-Nielsen 'Children' in Cheadle, Davis, & Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) p 526 - 537.

maintenance issues; the complexity of the matter, including the length of the hearing or trial, the number of expert witnesses involved and allegations that one parent is emotionally unstable; and where there is reason to believe that one of the parties is withholding information from the court[52].

In a General Comment from the Committee on the Rights of a Child, dated 20 July 2009, the committee recommends that the main issues which require that the child be heard are divorce and separation matters, when a child is separated from parent and placed in alternative care and adoption matters when a child is old enough to understand the implications of adoption[53].

Who should be assigned as the child's legal representative?

Section 28(1)(h) states that a legal practitioner must be assigned to the child 'at state expense'. This has lead to confusion over which government department is responsible for the provisioning of legal representation for children. The matter of *Ex Parte Van Niekerk and another: In re Van Niekerk v Van Niekerk*[54] was the first matter in which a legal representative was appointed for children and the children joined as parties in the matter between their parents. There was uncertainty about who should provide the legal representation and the court referred the matter to the Office of the State Attorney and ordered the State Attorney to appoint a legal representative for the children. This approach was, however, flawed as the State Attorney does not have the capacity or expertise to provide legal representation in family law matters. The State Attorney forms part of the Department of Justice and their main function is to institute and defend litigation on behalf of government departments and officials.

The High Court, as the upper guardian of all minors, retains its inherent power to appoint legal practitioners to represent children where they consider it in the best interests of children to do so. The cases of *Soller NO v G*[55] and *R v H*[56] demonstrate that the Courts have, in the post 1996 constitutional era, interpreted this to include the power to appoint legal representatives in terms of section 28(1)(h), and not only the common law power to appoint a curator ad litem.

However, the system of assigning legal representation for children cannot depend solely on the powers of the High Court to make such appointments. Firstly, section 14 of the Children's Act indicates that children have the right to institute legal action. If their right to legal representation can only be accessed via an order of a High Court, the child would have to obtain legal representation to assist the child in bringing an application to obtain a legal representative. This would be impractical, expensive and near impossible for children to achieve independently.

The matter of *Legal Aid Board v R*[57] definitively decided that the Legal Aid Board was the correct institution to approach to obtain legal representation for children. The matter concerned a 12 year-old girl who had been the subject of an acrimonious battle between her parents since she was 5 years old. At a previous hearing the presiding judge directed that the Minister for Justice and Constitutional Development must make arrangements for a legal representative to be appointed for the child. This order was, for several reasons, impractical and could not be carried out. The child contacted a well-known non-governmental organisation, Childline, and repeatedly registered her request for a legal representative with that organisation. With the assistance of Childline, a legal representative was appointed for the girl by the Legal Aid Board.

The mother of the child, who had custody of her, contested the appointment of a legal representative for the child on the ground that she was the child's guardian and that she should have been approached in the first instance. The mother refused to allow contact and consultations between the child and her attorney. The Legal Aid Board approached the court on an urgent basis for a declaration that it had the authority, and indeed a duty, to appoint a legal representative for the child; that such legal representative had been duly appointed; and that he should be allowed to consult with the child and

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[52] Kassan in Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* p 237-238.

[53] *The Right of the Child to be Heard* Committee on the Rights of the Child General Comment no 12 CRC/C/GC/12 20 July 2009.

[54] [2005] JOL 14218 (T).

[55] 2003 (5) SA 430 (W).

[56] 2005 (6) SA 535 (C).

[57] *Legal Aid Board v R* 2009 (2) SA 262 (D).

represent her in all litigation between her parents concerning her.

The mother contended that such appointment was unnecessary as the mother is the guardian of the child and as such is acting in the best interest of the child. She further argued that Legal Aid South Africa was not empowered to appoint a legal representative for a child and that it must be the guardian of the child or the High Court who appoints a legal representative for the child. The court surmised that the mother's objections were based on the fact that she was not consulted on whether an attorney should be appointed for the child and if so, who should be appointed. She also demanded that a legal representative be subject to conditions that would limit his powers to act on behalf of the child, including that the mother be consulted at every turn[58].

However, the court found that the appointment of a legal representative for this child would not only be helpful, it would allow the child to participate in the proceedings. The child had indicated to experts and the attorney appointed for her by the Legal Aid Board that she wished to express her own opinions and a previous judge had already pronounced on the need to appoint a separate legal representative for this child due to the level of acrimony in the litigation between the parents. It was therefore clear that there was a need to hear the child independently from her parents[59].

Moreover, section 3 of the Legal Aid Act 22 of 1969 charged the Legal Aid Board with the duty to provide legal representation for the indigent. Section 28(1)(h) requires the provision of legal representation for children at 'state expense'. Willis J found that section 3 of the Legal Aid Act is broad enough to include all situations where the Constitution requires the appointment of legal representation by the state. The Legal Aid Board is ideally suited to provide such representation. Furthermore, the Legal Aid Board placed evidence before the court that it has legal practitioners who specialise in representing children, that they have budgeted for such representation and that they see it as their duty in terms of the Constitution. The Legal Aid Board is therefore best placed to discharge the state's duty in terms of section 28(1)(h)[60].

Who should assign a legal representative for the child?

In *Legal Aid Board v R* the court also addressed the mother's objection that it is the High Court as upper guardian of the child who should request that a legal representative be appointed for the child and that the Legal Aid Board is not empowered to do so on request from an outside party or the child herself. This raises questions as to how children should in practice accomplish obtaining legal representation if they can only do so by approaching a High Court? Should the Legal Aid Board first assist children for the limited purpose of obtaining consent from the court that a legal representative may be appointed for them?

Wallis J found that this approach would not be in the best interests of children. It is a cumbersome procedure that may result in delays and requires extraordinary actions on the part of the child. The child in question reached out to a reputable organisation, Childline, and repeatedly indicated that she wished to have her own legal representative. Having already found that the Legal Aid Board is a suitable agency specialising in assisting children, the court concludes that the Legal Aid Board is empowered to appoint a legal representative for a child without the approval of a High Court[61].

The Children's Act does not include a specific section providing for separate legal representation for the child in all matters as a general principle, but provides for legal representation for the child in different chapters of the Children's Act:

Section 14 provides that '[e]very child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court'. It is implicit that in order to bring a matter to court a child will need the assistance of legal practitioners. Section 14 seems to envision the institution of litigation by a child and a child can therefore not be dependent on assignment of a legal representative by the court but will need to obtain legal representation before approaching the court. The *Legal Aid Board* matter makes it clear that it is not necessary that the court must assign the legal representative or decide whether legal representation of the child is necessary. The Legal Aid Board may assign legal

[58] *Legal Aid Board v R* 2009 (2) SA 262 (D) p 267F–268E, 268I–269B, 274E and 275G – 276A.
[59] *Legal Aid Board v R 2009* (2) SA 262 (D) p 270A.
[60] *Legal Aid Board v R* 2009 (2) SA 262 (D) p 273A-274D and p 276B-276F. See also Sloth-Nielsen 'Realising children's rights to legal representation and to be heard in judicial proceedings: an update' 2008 SAJHR 495.
[61] *Legal Aid Board v R and another* 2009 (2) SA 262 (D) 274G-275F. This approach was subsequently confirmed by the Supreme Court of Appeal in the matter Legal Aid Board: In re four children [2011] ZASCA 39 (29 March 2011).

representation for children at their own discretion according to the Legal Aid South Africa guidelines[62].

The scope and functions of the child's legal representative

The role of a child's legal representative is an exceedingly complex issue depending on a myriad of factors which may vary in each case, including the age and maturity of the child, the nature of the matter and the forum in which the proceedings take place. The child's legal representative should also be distinguished from other role-players that present evidence to court on the well-being of the child. In the *Soller NO v G* Satchwell J for the first time differentiated between the roles of the family advocate, a curator *ad litem* and a separate legal representative for the child.

The Office of the Family Advocate was created by the Mediation in Certain Divorce Matters Act 24 of 1987. As the title of the empowering legislation suggests, the Family Advocate acts as advisor to the court and mediator in relation to the family whom they have investigated. The Family Advocate does not represent any of the parties and is required to be neutral in order to investigate the dispute and report and make recommendations to the court[63]. During its investigation the Family Advocate will engage with the children to ascertain their views on their future after divorce. The Family Advocate will record the views of the children in the report and will consider them in order to make a recommendation, but the Family Advocate will not represent or advocate for the wishes of the child. Their role is to make a recommendation on the overall best interests of the child, which may in some instances be in conflict with the wishes of the child[64].

Furthermore, section 28(1)(h) was inserted into the Constitution with full knowledge that the office of the Family Advocate existed and that a section 28(1)(h) practitioner would not usurp the role of the Family Advocate. A separate legal representative for the child must therefore have a different role and responsibilities[65]. It is also important to bear in mind that children will not only require legal representation in divorce matters but could need assistance in various other matters, such as care and protection proceedings. Matters which do not deal with divorce or the status of unmarried fathers fall outside the mandate of the Family Advocate and they cannot always be called on.

Children have always received some protection through the common law, namely that where there was no parent or legal guardian capable of suing in respect of a minor's claim, the minor was entitled to have a curator *ad litem* appointed on his behalf. The drafters of the Constitution recognized that there may well be circumstances where, notwithstanding the common law protection, additional protection was required by a minor child in specific instances. The right of children to be legally represented in civil matters was included in the Constitution despite many other competing pressures and concerns[66].

Section 28(1)(h) requires the appointment of a lawyer, not a social worker or psychologist who will present the views of the child 'in the face of doubt or opposition from an opposing party or a court'[67]. In *Soller NO v G* Satchwell J summarised the position as follows:

> The Family Advocate provides a professional and neutral channel of communication between the conflicting parents (and perhaps the child) and the judicial officer. The legal practitioner stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child.

The role of the separate legal representative will depend on the nature of the proceedings and the age, maturity and stage of development of the child. As

[62] There are other sections in the Children's Act such as sections 22 and 34 which state that a child may only engage in litigation with 'the leave of the court'. These sections also indicate that the Children's Act meant for children to be able to obtain legal representation independent of the court, i.e. the legal representative does not have to be assigned by the court.

[63] *Soller NO v G* 2003 (5) SA 430 (W) paras 22-24.

[64] Kassan in Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 233.

[65] *Soller NO v G* 2003 (5) SA 430 (W) para 25.

[66] Skelton 'Special Assignment: Interpreting the right to legal representation in terms of section 28(1)(h) of the Constitution of South Africa' in Sloth-Nielsen & Du Toit Z (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (2008) 219.

[67] *Soller NO v G* 2003 (5) SA 430 (W) para 26.

stated by Satchwell J in *Soller NO v G*[68] and Langa CJ in *Minister for Education v Pillay*[69] it becomes increasingly important to listen to the voice of the child and allow the child to have a direct say in the proceedings, the older the child is. It follows that children who are older will require the assistance of a separate legal representative who will act on their instructions and follow their instructions during litigation. This is also referred to as 'client-directed' representation[70]. This means that a child is represented by an attorney and counsel in the same way as the attorney and advocate would represent an adult.

The role of the 'client-directed' legal representative must further be distinguished from that of a curator *ad litem*. A curator *ad litem* is appointed to safeguard the best interests of the child when the child does not have parents or a guardian; or if the parent of guardian cannot be found; or if the interests of the minor are in conflict with those of the parent or guardian; or if the parent or guardian unreasonably refuses or is unavailable to assist the child[71]. The duty of the curator *ad litem* is to assist the court and the child during legal proceedings and to look after the child's interest. A 'client-directed' representative on the other hand, acts upon the child's instructions and advocates on behalf of the child[72]. In *Soller NO v G* Satchwell J stated in relation to a separate legal representative for the child that 'neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador.'[73]

If a child does not have the capacity to give instructions then the legal representative acts as a 'best interests representative'. The role is similar to that of a curator *ad litem* in that a 'best interests representative' acts to ensure that the best interests of the child are protected rather than represent the views and wishes of the child as a client-directed representative would[74].

The burden is on the legal practitioner to determine his or her role and to be clear, both for practitioner him or herself and the court, on what his or her role is. Once a legal practitioner has assumed the role of either a client-directed or best interests representative, he or she may not change roles halfway through the hearing of the matter. For example: the representative determines that the child has the capacity to give instructions and proceeds with litigation on the basis that he is taking instructions and acting as a client directed attorney for the child. During the course of the proceedings, the child changes his or her instructions or the legal representative is persuaded by other evidence that the child's instructions are not in the child's best interests. The client-directed attorney may not change his role and resume representing the child as a best-interests attorney. Taking such an approach would negate the purpose of providing separate legal representation as the attorney would effectively be subverting the views and wishes of the child and replacing them with his own views.

South African courts have raised questions regarding the necessity to obtain expert proof that a child has the capacity to give instructions or if the legal representative may decide whether the child has the capacity to give instructions? In the matter of *BS and another v AVR and others*[75] the court was concerned over the children's capacity to depose to affidavits and to join them as parties as she was not convinced that they had sufficient capacity to understand the oath to depose to affidavits. There was a further risk that they may be called to give oral testimony and that they would be cross-examined on their affidavits. This relates directly to the capacity of the child to give instructions and to understand the litigation process. The court required that a report be filed by an expert to indicate whether the children did have the capacity to understand the litigation and the meaning of the oath. It is submitted that this may not be

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[68] 2003 (5) SA 430 (W).

[69] 2008 (1) SA 474 (CC) 494E-G.

[70] Mushowe *Legal Representation of Children in Care and Protection Proceedings in South Africa: An Evaluation of the Best Interests and Client-directed Approaches* 42.

[71] Davel 'General Principles' in Davel & Skelton *Commentary on the Children's Act* § 2-24.

[72] Dohrn *Urgent issues for lawyers representing Children* Conference Paper presented at Miller du Toit Inc 'Coming of Age: Child and Family Law' Conference held in Cape Town on 13-14 March 2008.

[73] *Soller NO v G* 2003 (5) SA 430 (W) para 26.

[74] For and in-depth discussion of the role of a best interest representative as opposed to a client-directed approach, see Mushowe *Legal Representation of Children in Care and Protection Proceedings in South Africa: An Evaluation of the Best Interests and Client-directed Approaches* 27-56.

[75] Unreported case no 7180 2008 (South Gauteng High Court) handed down on 26 June 2008.

necessary in every matter where the child is assigned a legal representative.

The older the child is the less likely it is that proof of capacity will be required. However, if the child is very young and there is doubt surrounding the child's capacity to give instructions, it is preferable to obtain an expert report. Obtaining an expert report may also assist the legal representative in ascertaining whether the child can give instructions from the outset in order to avoid confusion over the role of the legal representative. An assessment of the capacity of the child to give instructions must be made on a case by case basis as there is no lower age limit at which a child may participate or obtain separate legal representation[76].

7. Conclusion

There have been substantial developments in case law and legislation to promote children's right to participate and in particular the child's right to have a separate legal representative assigned to him or her. Significantly, the Constitutional Court endorses an approach to litigation which respects the views, wishes and opinions of children in all matters where they are concerned. Furthermore, the international law and the Children's Act mandate the participation of children in all matters where their lives and well-being are concerned. There is therefore now a normative framework in South African law which calls on courts and practitioners to respect the child's right to participate when decisions are being made that affect them.

There are still numerous issues which need to be addressed in case law to determine how the practice of representing children in civil matters between their parents is going to develop. The manner in which children should participate in civil proceedings is still uncertain in respect of joining the child as a party or whether the child should placing evidence before the court on affidavit or speak to a presiding officer in chamber. In order to make separate legal representation of children effective, however, it is submitted that the international law, section 28(1)(h) of the Constitution and the Children's Act should be seen as creating opportunities for the child to participate in litigation in a manner equal to adult parties.

[76] See *The Right of the Child to be Heard* Committee on the Rights of the Child General Comment no 12 CRC/C/GC/12 20 July 2009.

An Everyday Story of Cross-Border Folk

1. Comity of Nations and *Toland v Futagi*

Kelly Powers*

Introduction

One hundred and seventeen years ago in 1895 the Supreme Court of the United States made clear that secret foreign judgments issued without notice and due process of law will not be recognized in the United States under the principle of the comity of nations[1]. *Hilton v. Guyot*, 159 U.S. 113, 167, 16 S.Ct. 139, 144 (1895).

This Court's *Hilton* opinion was decided in a year where Grover Cleveland was the President of the United States, there were only 44 states in the Union, Georgetown had not yet become a part of the District of Columbia, light-bulbs had not yet been invented, the first United States patent for a gas powered automobile was issued and the first automobile race took place in the United States where the top speed of the winning car was 7.3 miles per hour. Airplanes did not exist.

Over a hundred years later, one can travel from Washington, D.C. to Tokyo (6,772 miles) in just 13 ½ hours by air. As of 2010, twenty percent of children born in the United States have at least one foreign born parent. According to statistics kept by the United States Department of State, in the year 2011 alone some 1,728 children were abducted by family members between the United States and foreign nations, which includes only the incidents actually reported to the Department of State. (http://travel.state.gov/abduction/resources/resources_3860.html). Families move from city to city, state to state and country to country as a matter of course, using the courts of nations throughout the world to resolve their family difficulties.

The world has therefore fundamentally changed since the *Hilton* decision. *Hilton* applied in a different world and is out-of-date in our modern world. The *Hilton* comity of nations principle applied in the United States court should be clarified, developed and applied in the twenty-first century context.

Captain Toland's case concerns the need for the modern development and application of the *Hilton* comity principle: what is a court in the United States to do when the foreign nation does not adhere to our modern standards of due process and fundamental principles of human rights? In Captain Toland's context it is comity as applied to due process and the fundamental right to parent one's child worldwide; but the development of the principle is necessary and would be vastly instructive in all legal fields given the onslaught of globalization.

The *Toland v Fultagi* Case

United States Navy Captain Peter Paul Toland Jr., is the biological father and only living parent of Erika, now age 9. Captain Toland has not seen Erika since she was abducted by her now deceased mother in Japan in 2003. Erika's mother, Etsuko Futagi Toland, died in 2007. After the mother's death, Erika's maternal grandmother took physical possession of Erika and obtained guardianship of Erika in a secret guardianship hearing in Japan. Captain Toland – Erika's only living parent – had no notice whatsoever of the secret guardianship proceedings. Captain Toland has been engaged in a nine-year quest to be reunited with his daughter, who remains wrongly retained in Japan by the maternal grandmother. Captain Toland has resided in Maryland since 2009. Ms. Futagi has continued to deny Captain Toland all access to Erika.

On 2 October 2009, Captain Toland therefore filed his original Complaint to Establish Custody in the Circuit Court for Montgomery County, Maryland. Captain Toland resided in Maryland at the time of his initial filing and resides there to this day.

At the time of filing his original Complaint in this matter, Captain Toland did not know of any order in place anywhere in the world awarding custody, guardianship

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[1] For the wider issues in relation to comity of nations see L Mosesson "Comity of nations and *Toland v Futagi*" (2012) 3 FLP 1

or control of the minor child to the maternal grandmother or to any other living person. On 9 April 2010, after filing his original Complaint, Captain Toland learned by chance that the Japanese court had appointed the maternal grandmother to be the guardian of the minor child. Captain Toland had no notice whatsoever of any Japanese proceedings and therefore did not have any opportunity to be heard or participate in the guardianship proceeding in Japan in any way.

Ms. Futagi filed a motion to dismiss Captain Toland's now amended Complaint, arguing that Japan was the jurisdiction to make a child custody determination. Captain Toland argued in opposition that the circuit court did have jurisdiction under Maryland's Uniform Child Jurisdiction and Enforcement Act ("UCCJEA").

Captain Toland relied on the crucial comity provision, Section 9.5-104(c) of the UCCJEA, which provides that a court need not apply the statute if the child custody law of the foreign country in question violates fundamental principles of human rights. Captain Toland explained that Japan's child law violates fundamental principles of human rights, namely his right to due process and the fundamental liberty interest in the care and control of his daughter under the United States Constitution and the Maryland Declaration of Rights. The Japanese court system had held a secret guardianship hearing and had awarded guardianship of the child to a third party without any notice or opportunity to be heard.

It was undisputed and confirmed by both parties' Japanese law experts in the Maryland case that notice to biological parents is not required under Japanese law in guardianship proceedings. It was also undisputed that the rights awarded to a guardian in Japanese guardianship proceedings relate to the day-to-day care and upbringing of the child, the ability to make medical decisions on behalf of the child, and the ability to direct the child's education – what amounts to custody of any child.

The circuit court issued its Memorandum Opinion and Order on June 10, 2011 dismissing Captain Toland's Complaint and held that Japan's denial of due process to Captain Toland and its secret guardianship proceedings did not constitute a violation of fundamental principles of human rights.

Captain Toland appealed and the Court of Appeals affirmed the circuit court's decision. It found that the entry of a secret guardianship order in favor of the third party maternal grandmother did not constitute a violation of fundamental principles of human rights. The Court of Appeals accorded comity to the Japanese court system and deferred to Japan to make any other custody determinations with respect to Captain Toland's daughter.

The Comity of Nations Principle in the Modern International Law Context

Captain Toland's case presents an issue of paramount national and international importance that has not been addressed by the Supreme Court of the United States in over a hundred years.

In the United States, there is no doubt that "[t]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests" protected by the United States Constitution. *Troxel v. Granville*, 530 U.S. 57, 64 (2000); see also, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the Due Process Clause of the United States Constitution protects the rights of parents to bring up their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) (the liberty of parents to direct the upbringing of their children is protected); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (confirming that parents have a constitutionally protected right to direct the upbringing of their children); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (parents have a fundamental liberty interest in the "care, custody, and management of their children."); *Washington v. Gluksberg*, 521 U.S. 702, 720 (1997) ("the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children.").

Child custody litigation is now global. Recognizing the regularity of jurisdictional disputes and the need for consistency in jurisdictional determinations, forty nine of the fifty states have already adopted the UCCJEA. This statute sets forth a framework to determine the proper jurisdiction to make a child custody determination. Crucially, it adopts an international comity safeguard provision whereby the usual jurisdictional requirements of the statute need not apply when the law of the foreign country at issue violates fundamental principles of human rights.

This comity safeguard provides courts in the United States with a jurisdictional safe-haven for proceeding with a child custody case. This safeguard serves to

ensure that the principles of comity first enumerated in the *Hilton* case are maintained and that the desire to cooperate with sister states does not undermine the fundamental right to due process and the fundamental liberty interest – here Captain Toland's rights in the upbringing of his child as guaranteed by the United States Constitution.

The *Hilton* case provides instruction as to the circumstances under which United States courts may and may not accord comity to foreign judgments. What is still lacking is specific guidance to the state courts as to how to grant or not grant comity to a foreign legal system as a whole. Also lacking is how to determine when to defer and when not to defer to the foreign system for adjudication of future disputes – such as disputes involving children -- the type of dispute that implicates the oldest of the fundamental liberty interests in this country.

The Supreme Court has explained that "'comity' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." , 159 U.S at 164, 16 S. Ct. 143.

The Court has further explained that " . . .comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy and the character of her institutions; that in the conflict of law it must often be a matter of doubt which should prevail; and that whenever a doubt does exist, the court which decides will prefer the laws of its own country to that of a stranger." *Id*. at 164, 144. With nearly 200 sovereign nations, courts in the United States need more clarity.

The *Hilton* court set a standard for according comity to a foreign court's judgment: " . . . where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizen of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in the judgment or any other special reason why the comity of this nation shall not allow it full effect." *Id.* at 202, 159.

Yet the doctrine of comity encompasses not only the recognition and enforcement of foreign judgments, but is also used as a basis to consider whether to proceed with litigation in a United States court or to defer to a foreign court because of the pendency or availability of litigation in the foreign court. *Diorinou v. Mezitis*, 237 F. 3d 133, 139-40 (2d Cir. 2001). Such is the issue in Captain Toland's case. Courts need direction with respect to the application of the principle of the comity of nations to whether to proceed with litigation in a United States court or to defer to a foreign court because of the pendency or availability of litigation in the foreign court.

The Maryland Court of Appeals decision finds itself in direct conflict with *Troxel* and *Hilton* because there is currently no guidance as to how a court determines whether to defer to a foreign court because of the pendency or availability of litigation in the foreign court. In direct conflict with *Troxel*, the Court of Appeals of Maryland decision has allowed a third party to retain the care and control of a child. The Court of Appeals of Maryland's decision conflicts with *Hilton* because it deferred the child custody determination to Japan and required Captain Toland to attempt to litigate in a forum that has already held secret hearings against him and his child.

Such conflicts must be addressed and resolved. Such conflicts are likely to occur regularly in state courts throughout this country unless this Court intervenes and establishes clear and modern guidelines. Captain Toland is not concerned with mere discretionary juxta-positioning of minor cultural or procedural differences between the United States and foreign jurisdictions in child custody disputes. Rather, Captain Toland needs the Supreme Court to establish a clear bar for his case and for future courts who must determine whether to accord comity to a foreign system. There is a national need for the Supreme Court to explain when a court should defer to the foreign court because of the pendency or availability of litigation in the foreign court. That litigation is theoretically possible in a foreign court should not be enough to require a party to litigate there when the foreign court has already been seen to have been unworthy of comity.

2. *Toland v. Futagi* – The Japanese law perspective

Mikiko Otani*

Introduction

The Maryland Court of Appeal in the *Toland v. Futagi* case affirmed the Circuit Court decision to dismiss Mr. Toland's Complaint to determine custody of his daughter Erika residing in Japan by finding that the appointment of Ms. Futagi, Erika's maternal grandmother as Erika's guardian by the Japanese court did not violate Mr. Toland's fundamental rights and that the exception clause of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA or Act) which allows the Maryland Court to exercise jurisdiction exempted from the jurisdictional rule under the Act when "the custody law of a foreign country violates fundamental principle of human rights" is not applicable.

Mr. Toland, in this case, argued that Maryland Court should exercise custody jurisdiction despite the fact that Erika was born and has lived exclusively in Japan. His arguments under the Maryland UCCJEA were in two parts. Firstly, Japan could not be considered Erika's home state because she was only physically present in Japan as a result of Ms. Futagi's unjustifiable conduct and the Maryland Court should exercise "vacuum jurisdiction". Secondly Japanese family law violates the "fundamental principles of human rights" because the Japanese guardianship decree was issued without notice to Mr. Toland, the Japanese custody law violates the "fundamental principles of human rights" in terms of the methodology and criteria for awarding custody and the Maryland Court was therefore allowed to exercise custody jurisdiction by disregarding the application of the UCCJEA.

While the *Toland* case does not involve the issue of "international" child abduction in a sense that Erika, the minor child at issue, has never been removed cross border, the question raised in the case has significant implications in the international child abduction context between the US and Japan. The question directly asked in the *Toland* case was whether Japanese custody law violates the "fundamental principles of human rights" so as to constitute the exception clause of the UCCJEA. However, underlying this question is a wider issue of application of international comity between the US and Japan, in particular, in international child abduction cases, namely whether the child custody decision of the other country can be recognized and enforced, and whether a country should exercise custody jurisdiction refusing comity to the other country.

The UCCJEA Exception Clause and its application in the US-Japan custody disputes

The UCCJEA requires the US Court to recognize and enforce custody decisions made in a foreign country which is in conformity with the jurisdictional standards of the Act. However, the UCCJEA exempts the US Courts from applying the Act if the child custody law of a foreign country violates "fundamental principles of human rights". An alleged application of this exception clause can be envisaged in a case where a custody decision is made in the Japanese Court, the Japanese parent seeks to enforce the custody decision in the US under the UCCJEA and the American parent challenges the enforcement of the custody decision by arguing that Japanese custody law violates "fundamental principles of human rights".

Interestingly, the actual attempt to apply this exception clause has been made in a different way: the American parent sought a custody determination in the US Court by arguing that the jurisdictional rule of the UCCJEA did not apply because Japanese custody law

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violates "fundamental principles of human rights" while there is no custody decision made in the Japanese court. The *Toland* case is one example of the actual cases of this category. The In *Re Atsuko Kotake Hickman* case in the Texas Court of Appeal is another. Commonly observed in these two cases is scepticism of the American parents about Japanese custody and the Japanese court proceedings. Presumably because of that scepticism, neither of the American parents in these cases had ever tried to seek custody determination in the Japanese court, although they could have done so. In the circumstances where the American parents did not pursue a custody decision in the Japanese court, the Texas Court of Appeal took the approach that it "will not speculate on how a Japanese court will respond to a custody challenge by [Mr. Hickman]", while the Maryland Court of Appeal refrained from reviewing the Japanese custody law, as rendering an advisory opinion on a custody question which is not ripe is a long forbidden practice in the US.

Implication to the US-Japan international child abduction cases

If the *Toland* case represents the widely shared scepticism of the American parents against Japanese custody law and the Japanese court system, it implies that a similar argument will continue to be raised in the US court in US-Japan international child custody disputes, which is already confirmed by the *Hickman* case. While neither of the courts in the *Toland* nor the *Hickman* cases found that Japanese custody law violates "fundamental principles of human rights", partly because there was no custody decision, how will the same question be answered if the American parent is denied custody and access by the Japanese court and takes the child to the US and seeks a custody decision in the US Court by arguing that the US Court should exercise custody jurisdiction because of the exception clause of the UCCJEA as the Japanese custody law violates "fundamental principles of human rights"? A similar argument is anticipated in a case where the child might be taken from Japan to the US by the American parent, a custody order is issued by the Japanese Court, the Japanese parent seeks enforcement of the custody order in the US and the American parent challenges the enforcement by arguing the Japanese custody law violates "fundamental principles of human rights". In those cases, the US Court may not avoid deciding whether Japanese custody law violates "fundamental principles of human rights".

A more significant question implied in the *Toland* case would be an alleged application of Article 20 of the Hague Convention on the Civil Aspects of Child Abduction, which permits a country to refuse to return a child if the return would violate "the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms". If this occurred in return proceedings under the Convention, in the context of incoming cases from Japan if Japan joins the Hague Convention and the Convention becomes effective between the two countries, the US court can refuse return of the abducted child to Japan if this article is applied and can exercise the custody jurisdiction.

However, the US Department of State has interpreted "the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" as "utterly shock[ing] the conscience or offend[ing] all notions of due process." Furthermore so far Article 20 has been narrowly interpreted and the application of this article has been denied in contracting States of the Convention including the US, although the left behind parents have sometimes argued that the custody law or custody decisions of the child's country of habitual residence were contrary to the fundamental principles of human rights of the requested country.

Reciprocity and international comity

In September 2010, the US Congress passed the resolution 1326, which calls on the Government of Japan to address the urgent problem of abduction to and retention of American children in Japan. The original draft when introduced into Congress in May 2010 contained in preamble the sentence that "Whereas there exists no due process within the Japanese family court system for the redress of such disputes, and the existing system has no recognized process to enforce a custody or parental access order from outside of Japan or within it, without the voluntary cooperation of the abducting parent or guardian." This sentence, although deleted in the adopted resolution, indicates frustration of American parents about the situation where a custody order made in the US court has not been enforced in Japan. If it is true

that a custody order made in the US Court is not enforced in Japan, such a situation would have a negative influence on the US Court decision when it is asked to enforce a custody order of the Japanese Court as reciprocity is an essential element of international comity where countries recognize and enforce the decision of the courts based on the courtesy of respect of each other's legal system.

As a matter of fact, reciprocity is one of the conditions for recognition and enforcement of a foreign court order under Japanese law (Article 118 (4) of the Code of Civil Procedure). While it is not clear if and how the reciprocity principle works in applying international comity, it seems critically important carefully to apply the "public policy" clauses such as the exception clause of the UCCJEA and the Article of the Hague Child Abduction Convention. If an argument by the abducting parent that the custody law of the country of habitual residence of the child violates "fundamental principles of human rights" is easily accepted, and the court in the country to which the child was abducted can exercise custody jurisdiction, such loose application of the "public policy" clauses will only encourage the harmful practice of international child abduction. What is worse would be a negative application of reciprocity as reprisal for the easy application of Article 20 in the return proceedings under the Hague Child Abduction Convention.

The "Public policy" clause in Japanese law

In Japan, a finalized foreign country court judgment is recognized if it meets the four conditions set out in the Article 118 of the Code of Civil Procedure: (i) the foreign court has the jurisdiction according to the jurisdictional rule under Japanese law; (ii) the defeated defendant has received a service; (iii) the content of the judgment and the court proceedings are not contrary to public policy in Japan; and (iv) a mutual guarantee exists. The third condition is the "public policy" clause.

The Tokyo High Court decision of 15 November 1993 did once apply the "public policy" clause in a US-Japan child abduction case where the Japanese woman took the child from the US to Japan and the left behind American father sought enforcement of the Texas Court decision ordering return of the child to the US. The Tokyo High Court pointed to the fact that four years had passed since the child had begun to live in Japan, that the child, now ten years old, was used to the Japanese language and could neither read nor write English and found that the Texas Court judgment ordering return of the child was contrary to public order as its enforcement is obviously harmful to the welfare of the child.

This Tokyo High Court decision is the only publicized Japanese court decision to my knowledge where enforcement of a foreign court custody decision was denied by applying the "public policy" clause. The Tokyo District Court Hachioji Branch decision of 8 December 1997 denied enforcement of the New York Court decision ordering return of the child to the left behind American father for the reason of lack of valid service to the abducting mother and did not examine the argument by the mother that the New York Court decision was contrary to "public order". On the other hand, no court decision has been known where the application of the "public policy" clause was argued, examined and denied when enforcement of the custody order of a foreign court was sought. Owing to scarcity of case law where the application of the "public policy" clause was at issue, interpretation of this clause in international child custody disputes has yet to develop in Japanese case law.

Conclusion

The *Toland* case contained a particular question: whether Japanese law violates "fundamental principles of human rights" by appointing the minor child's grandmother as her guardian without giving notice to her father, which was rather peculiar to the facts of the case. The broader question, which was raised in the Toland case, but left unanswered by the Maryland Courts, is whether Japanese custody law violates "fundamental principles of human rights". As suggested in this comment, this question is pertinent in the context of the US-Japan international child abduction. Although more clarification is needed for interpretation of "public policy" clauses in the respective laws of the US and Japan, how to interpret Article 20 of the Hague Child Abduction Convention in the courts of both countries would require a harmonized approach between two countries to achieve the objective of the Convention, so as to protect children from the harmful effect of their wrongful removal or retention cross borders.

3. Comity of Nations and *Toland v Futagi*

Dr Lars Mosesson*

Underlying Kelly Powers's article[1], (the first, above[2] in this trio) is the wider constitutional issue of the general recognition of foreign judgments across the world – or, more specifically, the internationally acceptable limits to the non-recognition of foreign judgments.

The needs

Powers suggests that US jurisdictions need clarity on this issue; but this and principled consistency are needed also in all jurisdictions around the world. This comment identifies some of these wider issues, which involve domestic, regional and global law and both judicial and enacted law, within which her article rests.

Ralf Michaels states the general position on recognition thus[3]:

> The judgments of one State's courts have no force by themselves in another State. This is often unsatisfactory. Parties are interested in transnational legal certainty and in avoiding repeated litigation and conflicting decisions: the general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies; and States have a common interest in promoting inter-State transactions. However, States have valid reasons to deny foreign judgments the same force they grant their own judgments, since the foreign procedure may be viewed as deficient ... The field of recognition and enforcement of foreign judgments mediates between these competing considerations.

Cases such as *Toland* concern the legal status of individuals[4] whose disputes come under the jurisdiction of more than one legal system. Clarity, practicality and finality are needed by all the parties, as is true in all areas of law. However, these cases, because of the increasing mobility of people, have the added complication that the decisions as regards status should be consistently made and recognised in the different jurisdictions, both within a state[5] and across the world. Hence, we need international agreement for deciding these matters on a clear and principled basis that will be recognised in all jurisdictions, despite our cultural differences; and, as is shown in a case like *Toland*, different systems, because of their cultural differences, may have different approaches to securing the rights or best interests of the child.

The issues

In approaching the present issue we need to distinguish recognition of jurisdiction, recognition of a judgment, and enforcement of a judgment. These may all arise in a single case and may overlap; but they are separate issues in principle. Our concern here is primarily with the second of these, and thus with establishing the status of the parties for the purposes of all jurisdictions.

Let us identify the core issue in *Toland*. There is no doubt that the Japanese tribunal had jurisdiction, as the

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[1] I am indebted to my colleague, Egle Dagilyte, for her helpful comments on a draft of this piece

[2] Ms Powers gives the facts of *Toland v Futagi* in her article, but they may be summarised thus. The father (T) was a US citizen, resident in Maryland, and the mother (F) was Japanese. Shortly after the birth of their daughter, the mother (possibly illegally) took the daughter to Japan. The father was unable to get access to his daughter. After the mother died, a Japanese tribunal, without informing the father, ordered that the daughter, now aged 9 years, should be put in the guardianship of her maternal grandmother in Japan, with the father having no rights of access. He sought an order from the courts in Maryland that he should have custody. The courts in Maryland declined to make the order, because of the order of the Japanese tribunal. An appeal has been lodged with the US Supreme Court.

[3] Ralf Michaels in the Max Planck *Encyclopedia of Public International Law: Recognition & Enforcement of Foreign Judgments*, section A.

[4] Much of the legislation and case-law in this area of the Conflict of Laws concerns commercial matters, often the enforceability of foreign judgments for damages, so some of the authorities must be treated with care.

[5] Such as the USA, Germany or Nigeria, with their federal structures.

child was habitually resident in Japan, and this provides an internationally agreed sufficient connection in such a case; it was accepted that the process in the tribunal accorded with Japanese law; and the juristic issue is not the merits of the decision by the Japanese tribunal. Moreover, there is no inherent problem with the use of a decision-making process other than an open court: indeed, such methods are to be welcomed in cases involving children and families - but only if the process meets the minimum standards of justice as recognised internationally.

The essential problem in *Toland* is that Japanese law did not require notice to be given to the father, let alone that he be given a chance to address the tribunal, before the fate of his daughter was decided. These points appear to be clear violations of the requirements of a fair trial, for example within art 6 of ECHR[6], and of the requirements of Natural Justice at Common Law[7].

So how should a court, such as those in Maryland, go about establishing the basis for the recognition of a foreign judgment, where, as in this case, the process is very different from that in the *lex fori* and appears to be defective according to international norms?

It cannot be simply a free choice for each court hearing the case: this would be likely to result in conflicting decisions from different jurisdictions, which would be a juristic and practical failure. Hence, over the decades, jurists, judges and legislators have sought to reduce conflict and forum-shopping, and to achieve greater uniformity of results in these cross-border cases, by identifying a principled basis. The need for this continues to increase, but the juristic process is not complete.

One of the bases used in this process, as Powers states, has been comity[8]. The term has different meanings, but in this context we can take the well-known formulation from the US Supreme Court in *Hilton v Guyot*[9]:

> [Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.... [It] is, and ever must be, uncertain; ... it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; ... no nation will suffer the laws of another to interfere with her own to the injury of her citizens; ... whether they do or not must depend on the condition of the country of which the foreign law is sought to be enforced, the particular nature of her legislation, her policy and the character of her institutions...

The Supreme Court expanded this later[10] as requiring:

> [That] there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice...

Whilst this positive formulation has merit in defined areas, it clearly does not apply to cases such as *Toland*, and it cannot be seen as a complete statement on recognition and non-recognition[11]. Hence, we need to look elsewhere for further guidance.

Granted that we are concerned here specifically with the grounds for non-recognition of a foreign judgment on a basis which is in accordance with International Law, we may move to assume that the judgment in question was made by a tribunal with recognised jurisdiction; and to focus on the internationally accepted norms for non-

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[6] European Convention on Human Rights 1950. See, for example, the decision of the European Court of Human Rights in Pellegrini v Italy, application no. 30882/96, Final Judgment given on 20.10.2001.

[7] See *Ridge v Baldwin* [1964] AC40, and the many cases since then.

[8] This basis is popular in the USA. However, it should be noted that Graham & Steen assert that elsewhere comity "is not the basis for recognition and enforcement ... [and] is best avoided": see Trusts & Trustees Vol 17, No 4 at 335 & 341. They cite *Adams v Cape Industries plc* [1990] Ch 433; Dicey, Morris & Collins, *Conflict of Laws* 14th Ed. at 14-006. "comity has been rejected as the basis for recognition of foreign judgments in England"; and Bridge & Rees (Civil Jurisdiction & Judgments 6th Ed at 7.56) "comity has no part to play in the assessment of whether a foreign judgment should be recognised." Other bases formulated include reciprocity and "obligation" (in the case of judgments for liquidated sums): see the House of Lords in *Schibsby v Westenholz* (1870) and Ralf Michaels in the Max Planck *Encyclopedia of Public International Law: Recognition & Enforcement of Foreign Judgments*, section B. None of the bases is entirely satisfactory.

[9] 159 US 113 (1895) at 164

[10] Ibid at 202

[11] The formulation in *Hilton* may be taken as a statement of when a foreign judgment will be recognised by the US court, but it does not mean that foreign judgments will not be recognised in any other circumstances.

recognition. There have been many pieces of legislation and judicial decisions in the USA, England, Japan[12], the EU and the ECHR, which may help us see how some consensus is emerging, albeit slowly.

In the USA[13], the Fourth Amendment, the UCCJEA section 9.5-104(c) and the Speech Act 2010[14] identify or imply qualifications to recognition, essentially on the grounds of non-respect for human rights in the decision by the foreign tribunal. This complements the implied requirement in *Hilton* that there must have been a "full and fair trial" in the foreign court.

Under English law, there are seen to be three broad grounds[15] for denying recognition in these cases: manifest substantive injustice, manifest procedural unfairness, and fraud[16]. This last will not be considered here, as it is well-established. Substantive injustice may now be seen in terms of the requirements of the ECHR and the Human Rights Act 1998; and procedural fairness in terms of Natural Justice at Common Law, which fleshes out the requirements of art.6 of the ECHR. Substantive justice is illustrated by *Oppenheimer v Cattermole*[17] (law discriminatory on grounds of race or religion) and *Adams v Cape Holdings plc*[18] (arbitrary allocation of damages). The requirements of Natural Justice here include being given adequate notice of the proceedings and having a proper opportunity to present your case[19].

Within the EU[20], art 33 of the Brussels Regulation, which deals with commercial and civil cases, provides:

> A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

However, art.34(1) provides a restriction on this duty on grounds of "public policy", but only where the domestic law breached is "regarded as essential in the legal order of the State ... or a right recognised as being fundamental within that legal order."[21] Also, art.34(2) provides a qualification in that a foreign judgment shall not be recognised if there was no sufficient notice or the party was unable to arrange for their defence. These are essentially the requirements of Natural Justice[22].

Regulation 2201/2003 ("Brussels II") applies to cases "concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility"; and it contains similar provisions. Art 23 in Chapter III identifies the grounds for non-recognition as including: "public policy", that the child was not heard, and that the relevant parties had no notice or opportunity to be heard[23].

The European Court of Human Rights has also recognised limitations on the duty to recognise foreign judgments, as in *Pellegrini v Italy*[24], where a foreign decree of annulment of a marriage was not be recognised unless it was seen to satisfy the requirements of art.6. The reasoning would seem to hold good in relation to all the articles in the Convention, and so include substantive justice in the criteria. The Court does, however, allow a variable margin of appreciation to the High Contracting Parties (which would apply to them as the foreign state in these circumstances) in deciding what the articles require of them. Nonetheless, both substantive and procedural justice will in principle provide limitations on recognition in this context.

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[12] See Judge Sumiko Ikemoto: "Recognition & Enforcement of Foreign Judgments on Child Custody Cases in Japan", Workshop Session 73, June 6, 1997, at hiltonhouse.com, for a review of a succession of cases in the Family Court in Japan on such recognition.

[13] See, for example, the treatment by Ronald A Brand for the Federal Judicial Center International Litigation Guide: Recognition & Enforcement of Foreign Judgments, April 2012.

[14] This limits recognition where the foreign tribunal did not respect freedom of expression to the extent provided for in the First Amendment.

[15] There are also cases where "public policy" has been cited as the basis: e.g. *Soleimany v Soleimany* [1999] QB 785 and USA v Montgomery (No 2) [2004] 1 WLR 2241.

[16] Cf: *Goddard v Gray* (1870) LR6 QB 288 which rejected grounds such as mistake of fact, mistake of law, and mistake of foreign law.

[17] [1976] AC 249 (House of Lords)

[18] [1990] 2 WLR 657

[19] *Feyerick v Hubbard* (1902) 71 LJKB 509.

[20] See also cases such as C-420/07 *Orams v Apostolides* [2009] ECR 1 3571.

[21] See *Krombach v Bamberski* [2000] ECR 1-395

[22] See also the case of C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*, CJEU, 6 September 2012, in which the CJEU considers non-recognition where the foreign judgment to be enforced was given in default.

[23] Cf: C-400/10 *PPU J. McB v L.E.*, judgment of 5 October 2010.

[24] Case 30882/96, Final Judgment given on 20.10.2001.

Conclusion

Currently there is no clear and fully agreed basis internationally for non-recognition; and conflict, uncertainty and expense are still lurking dangers. However, there does appear to be a growing consensus in most of the states most involved in these cases; and it must be desirable for different legal systems to learn from each other's experiences and formulations.

Insofar as the laws outlined above represent a cross-cultural view, it would seem that the consensus is that the primary response must be to recognise a judgment from a foreign tribunal with jurisdiction, unless there is good reason not to do so. As indicated above, there are good reasons of principle and practice for this approach. Moreover, there seems to be broad agreement that non-recognition will be proper or acceptable, where the foreign judgment was procured by fraud or violates the essential norms of substantive or procedural justice, however these norms are expressed in the different systems, for example, as including "public policy" and Natural Justice. Quite what these norms will mean in a given case will, of course, always be a matter of judicial judgement by the "home" court.

Beyond this, though, in cases like *Toland* there is the implicit practical solution - perhaps inspired by notions of comity, cross-border consistency and convenience for the courts - that the aggrieved party should go to the foreign state and seek their remedy there. This, of course, may not help people like Mr Toland, if the legal procedure in Japan is defective and if Japan has not signed up to any international provisions which might remedy those defects[25]. Perhaps if Mr Toland had tried to remedy the apparently defective decision by bringing proceedings in Japan, the US courts would be more willing to intervene; but this would still risk damaging judicial and political relations between the two countries. Notions of comity would remain a factor in discouraging non-recognition.

The ideal solution will be to get all states to agree to international norms for substantive and procedural justice in their systems, to complement the norms for jurisdiction and enforcement. However, in the real world until then, it will be necessary to have regional treaties and judicial decisions in the different jurisdictions that move us step by step towards a consistent principled basis for recognition and non-recognition of foreign judgments. Notions of national sovereignty and differing cultural attitudes and approaches will, however, always stand in the way of achieving such a basis. The decision by the US Supreme Court in the *Toland* case, if they accept the case, may help in this hesitant process, for both the states in the USA and other states across the world. If so, this would be a welcome contribution towards the formulation of an internationally acceptable and workable solution, which would address the practical consequences of movements and dealings across borders, as these are likely to become ever-more common.

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[25] A recent development reported by David Hodson on Family Law Newswatch on 7.9.12 is that Japan will not be ratifying the Hague Child Abduction Convention for at least a year and then only if changes or clarifications are made to the text. The Japanese government has been considering the matter since 2011, but the forthcoming general election and "strong feelings" about the test of "grave risk" mean that the matter will not even be put to the Diet in the near future. It seems there is a more general reluctance to embrace western notions in these areas of family life too readily.

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Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

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